TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 275

THE UNITED STATES OF AMERICA, EX REL. HUBERT JAEGELER, PETITIONER,

vs.

UGO CARUSI, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1951.

CERTIORARI GRANTED NOVEMBER 5, 1951.

SUPREME COURT OF THE UNITED STATES

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INDEX

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[fol. a] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10373

UNITED STATES OF AMERICA, ex rel. HUBERT JAEGELER, Appellant,

v.

UGO CARUSI, Commissioner of Immigration and Naturalization, and Carl Zimmerman, District Director for District No. 2, Philadelphia, Appellees

Appeal from the Final Order of the United States District Court for the Eastern District of Pennsylvania, Dismissing Habeas Corpus

Appendix to Brief for Appellant—Filed February 2, 1951

[fol. 1] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

1947

May 15. Petition for writ of Habeas Corpus and Order of Court directing writ to issue, filed.

May 15. Writ of Habeas Corpus exit.

May 16. Writ of Habeas Corpus returned "on May 15, 1947 Service accepted by Ugo Carusi" and filed.

May 21. In open Court. Hearing continued to Thursday, May 29, 1947.

May 21. Return of the United States to writ of Habeas Corpus filed.

May 28. Traverse to return of U. S. to writ of Habeas Corpus filed.

May 29. Hearing on question of jurisdiction. C. A. V.

June 16. Memorandum Opinion, Kirkpatrick, J., finding that restraint of liberty is sufficient to support the writ, filed.

June 24. Hearing. C. A. V.

July 15. Opinion, Kirkpatrick, J., directing that case go to trial on fact issue, filed.

1948

June 8. Plaintiff's Interrogatories to Defendants and Order of Court granting same and directing answer within sixty days from service, filed.

Aug. 5. Defendants' motion to discharge the writ, and in the alternative to prevent the taking of depositions of Secretary of State, filed.

Aug. 5. Order to place case on argument list, filed.

Sept. 7. Affidavit by Relator in opposition to Defendants', motion to dismiss Writ of Habeas Corpus or in the alternative to prevent the taking of depositions of Secretary of State, filed.

[fol. 2] Sept. 13. Hearing sur motion to discharge writ. C. A. V.

Sept. 30. Order of Court denying Defendants' motion to discharge writ and granting Defendants' motion to prevent the taking of the deposition of the Secretary of State, filed.

1950

Jan. 5. Petition for rehearing on Defendants' motion to discharge writ, etc., filed.

Jan. 5. Answer to Petition for rehearing on Defendants' motion to dismiss writ, etc., filed.

Aug. 4. Order to place case on Argument List, filed.

Sept. 6. Hearing on Petition for rehearing on motion to discharge writ of Habeas Corpus. Motion denied.

Oct. 9. Order of Court granting re-argument; dismissing writ of Habeas Corpus and remanding Relator to custody of respondents, filed. 10-10-50 noted.

Dec. 5. Relator's notice of appeal fined. c. c. to G. A. Gleeson.

Dec. 5. Copy of Clerks notice to U. S. Court of Appeals filed.

Dec. 28. Original Record transmitted to U. S. Court of Appeals.

IN UNITED STATES DISTRICT COURT

ORDER—Filed 5-15-47

And now, May 15, 1947, upon consideration of the foregoing Petition, the Court orders and directs that the Writ of Habeas Corpus as prayed for be issued forthwith hearing fixed for Wednesday, May 21, 1947 at 10 o'clock.

Geo. A. Welsh, U. S. District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judges District Court of Eastern District of Pennsylvania:

The Petition of Hubert Jaegeler, respectfully represents:

1. This is a petition for a Writ of Habeas Corpus directed to (1) Ugo Carusi (one of the Defendants) who is the Commissioner of Immigration and Naturalization for the United States and whose principal office is in Franklin Trust Building, Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania, and who has jurisdiction over the whole of the United States and, (2) Carl Zimmerman, Director of the Second Immigration District, which embraces the County and City of Philadelphia, and whose office is in the Pennsylvania Building Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania, and who has jurisdiction of Relator subject to the authority of the Commissioner, and (3) such other persons, if any, as may have jurisdiction over Relator or custody of him; and in support of such Petition Relator presents the following facts:

2. Hubert Jaegeler, Relator, was born March 20, 1897 in Brunswick, Germany and lawfully immigrated to the United States as a quota immigrant from Germany on the North German Lloyd steamship "Bremen" arriving in New York on or about September 30, 1925, and after being duly inspected he was thereupon admitted to the United States for permanent residence under the proper aforesaid name. After residing at divers places in Brooklyn, New York, and

St. Albans, Long Island, he finally took up a permanent [fol. 4] residence at 2112 West Venango Street, Philadelphia, Pennsylvania in the year 1936.

3. That Relator inter-married with Marie Eder at Jamaica, Long Island on May 8, 1930 and the parties have lived together as husband and wife from that time to the present, except for that period during which the Relator was interned and separated from his wife as hereinafter more specifically set forth.

4. That in the year 1933 Relator received permission to visit Germany, which he did for a period of about one month and returned to the United States on a re-entry permit.

5. That about June 1934 Relator applied for his first Naturalization Papers at New York.

6. That Relator's wife was naturalized at Mineola, New York about the year 1934, Petition No. 12321, Certificate No. 3610119.

7. That Relator was employed by Brunswick Asbestos Company, 1416 Wood Street, Philadelphia as a cutter of asbestos switchboards, and so forth, and was living with his wife at the aforesaid address 2112 West Venango Street, Philadelphia, Pennsylvania at the time of his hereinafter recited apprehension.

8. That on or about to wit; December 9, 1941 at about 1:30 A. M. the Relator was taken into custody by agents of the Federal Bureau of Investigation at his said home as an "enemy alien" under a warrant of arrest issued on behalf of the Federal Authorities. Relator was subsequently taken before a "Alien Enemy Hearing Board" in Philadelphia, at which time he was told that he was arrested as an enemy alien who might be dangerous to the national security and [fol. 5] he was asked if he had any statement to make. Relator replied that while he might be taken as an enemy alien, he was loyal and faithful to the United States and its Constitution and Prineiples, that he had never done anything prejudicial or injurious to the welfare of the Country and he demanded to know the charges and specific acts of which he was alleged to be guilty and he demanded his release. Relator was not then or any subsequent time advised in anywise as to the charges against him and he was immediately interned at the Immigration Station at Gloucester, New Jersey.

9. That on February 1, 1942 Relator was notified that he was interned for the duration of the War and Emergency.

10. In March 1942 he was sent to a military camp at Upton, Long Island and after ten days duration he was moved to a military camp at Camp Meade, Maryland. In November 1942 he was moved to Camp Forrest, Tennessee where he remained until May 1943 when he was moved to the Immigration camp for men at Bismarck, North Dakota. He remained there until May 1944 when he was sent to a family concentration camp at Ceagorville, Texas. His wife, Marie Jaegeler was permitted to live with him at the concentration camp, and she did so, remaining there from May 4, 1944 until May 9, 1946, when she returned to Philadelphia.

11. That on May 15, 1945 the camp at Ceagorville, Texas was closed and Relator was then sent to a similar camp at Crystal City, Texas where his wife joined him.

12. That sometime in August 1945 Relator was notified that the Attorney General had determined to repatriate him, but that he (Relator) could obtain a hearing before a Repatriation Board upon a request in writing. Such a [fol. 6] request was made by Relator and a hearing was had in October 1945 at Crystal City, Texas.

13. That in the month of January 1946 Relator was notified that the said Repatriation Board had recommended Relator's removal from the United States because "he was determined to be dangerous to the public peace and safety of the United States."

14. That on May 3, 1946 Relator received a formal notice from the Attorney General's Office to the effect that the Attorney General had determined to return Relator to Germany, that Relator would receive thirty days notice of such deportation, but that the thirty day period would not begin to run until Relator had arrived at Ellis Island, New York.

15. That on or about to wit April 15, 1947 Relator was given a parole for thirty days under the regulation relating to alien enemies, and he thereupon signed an agreement dated April 17, 1947 No. 5389866, File No. 4494-142 by which he was permitted to return to his home in Philadelphia, under the sponsorship of Daniel S. Lane, District Parole Officer. Relator was and still is required to make personal report to the District Parole Officer on Tuesday and Friday of each week at his office, Room 1219 Pennsylvania Build-

ing, 42 South Fifteenth Street, Philadelphia, Pennsylvania, and is further required to report to and surrender himself to the District Director at Philadelphia not later than May 15, 1947.

16. That during the whole of such time to wit: December 9, 1941 at 1:30 A. M. to present time, Relator has been under constant guard and custody in various detention camps and is now in custody of the Immigration and Naturalization Department under parole to the District Director at Philadelphia, Pennsylvania.

[fol. 7] 17. Relator is now living at 1204 Washington Lane, Philadelphia, Pennsylvania during continuance of the above mentioned parole and subject to the jurisdiction of the District Director of Immigration and also within and subject to the jurisdiction of your Honorable Court.

18. That Relator does not know and no cause or reason for his detention and restraint has ever been given or stated to Relator, except the implications arising from:

(a) Internment as an alien enemy, and

(b) The determination by the Attorney General of the United States that Relator "was determined to be dangerous to the public peace and safety of the United States."

19. That the Relator has never at any time been served with or given copies, nor informed as to the charges preferred against him, nor of the specific acts of which he is accused; that he was never confronted with any witnesses nor any testimony or evidence nor given any opportunity to cross-examine such witnesses or refute such testimony or evidence; nor was he ever advised that there were any witnesses who had or could testify against him, nor that there was any existence of any evidence charging him with such derelictions; that he was never represented by counsel; that at the two hearings before the two Boards the procedure was not in accordance with the accepted method of procedure in any Court of the United States; nor did the hearings comply with the requirement of the Federal Constitution or the Bill of Rights, nor were they in conformity with requirements of the Naturalization Code; that at no time was there a judicial determination of Relator's guilt; and that at no time was Relator permitted to know what charges he was required to contradict and defend.

[fol. 8] 20. That under the provision of the Naturalization Code no appeal is allowed or is provided for from the determination by the President of the United States or his Attorney General, although they provide for a hearing before deportation.

21. That under the several acts of Congress and the Presidential Proclamation the District Court having jurisdiction of Relator also has jurisdiction and power upon complaint, to arrest Relator and accord him a full examination and hearing, but no such action was ever taken.

22. That Relator has been unlawfully detained and restrained of his liberty by respondent as hereinbefore described, and that any further detention and restraint for the purpose of removing Relator were and continue to be unlawful for the following reasons:

(a) Relator since September 30, 1925 has been a legal resident of the United States and during such time has never been guilty of any offense against the peace and security of the United States.

(b) That Relator was and still is racially and legally eligible for Naturalization.

(c) That Relator is the husband of a citizen of the United States.

(d) That Relator has strictly complied with the Edict of the Presidential Proclamation No. 2526 issued December 8, 1941, requiring alien enemies to comport themselves diligently and faithfully to the laws of this Country.

(e) That the hearings given Relator before the Alien Enemy Hearing Board at Philadelphia, December, 1941, and before the Repatriation Board October, 1945, were not hear-[fol. 9] ings held in conformity with the accepted procedure and honesty of purpose customary in trying issues within the United States.

(f) That the Presidential Proclamation No. 2655, dated July 14, 1945 delegated to the Attorney General the right to determine that Relator and others were dangerous to the public peace and safety, and such delegation of authority is contrary to provision of the Constitution of the United States (Article I, Section I, and Article 6, Section 2).

(g) That the said delegation of authority to the Attorney General was to be based on the fact that the alien enemy

had adhered to the aforesaid enemy government, and no such proof of that fact is in evidence in the record.

(h) Because Bills of Attainder or Ex Post Facto Laws are unconstitutional (Artiele 1, Section 9, Const.).

(i) Because the conduct imputed to Relator is treasonable and no person may be convicted of treason except on the testimony of two witnesses to the same overt Act or on confession in open court (Article 3, Section 3, Const.).

(j) Because the incarceration and detention of Relator was and is an invasion of Relator's personal right to be secure in his person, etc. (4th Amend. Bill of Rights, Const.).

(k) That Relator is held to answer to an infamous crime without a presentment or indictment of a grand jury and because Relator has been deprived of his life and liberty without due process of the law (Const. 5th Amend.).

(l) Because Relator has been deprived of an open and public trial, refused information of the nature and cause of the accusations against him, and denied the right to confront the witnesses (Const. 6th Amend.).

[fol. 10] (m) That by provision of the alien enemy Act of 1798 (Section 4087 revised St.), Relator as a resident alien enemy was subject to only internment during hostilities, but could be removed only upon complaint and a hearing or trial in open court.

(n) That Section 220, Title 50 of the Acts of Congress provided that resident alien enemies are removable only by the Court.

(o) That as will appear by Congressional Record for July 30, 1919, pages 3361 to 3377, the Act of Congress of May 10, 1920, at 41 Stat. 593 was enacted because Congress in its debates had determined that internment itself was not prima facie evidence of undesirability, and that every internee must be given a full hearing in all deportation cases, and because they were advised that the Supreme Court decision already held that no executive officer could deport an alien without giving him a full and fair hearing as required by the principles of due process of law as understood at the time of adoption of the Constitution.

(p) That under the provisions of Resolution XXVI on Expulsion and Non-Admission of dangerous persons, the Emergency Advisory Committee for political defense (of

which the United States is a member) of April 12, 1946, Relator is exempted from expulsion.

(q) That by reason of Presidential Proclamation of December 31, 1946 declaring an end of hostilities (not an end of the emergency) Relator is no longer a subject of a hostile nation.

23. That a Writ of Habeas Corpus is the proper method to determine the right of detention of the person of Relator. [fol. 11] 24. That Relator previously filed a Petition for a Writ of Habeas Corpus with your Honorable Court, Civil Cause No. M-1171 and after argument the Petition was dismissed for lack of jurisdiction. The Relator at the time being interned in Crystal City, Texas.

25. That this Petition for Writ of Habeas Corpus is not inconsistent with the prior Petition nor its decision rendered therein, and that the decision in the prior case is not res adjudicata.

26. Wherefore Relator prays that a Writ of Habeas Corpus be issued directed to Ugo Carusi, Commissioner of Immigration and Naturalization and to Carl Zimmerman, District Director for District No. 2 at Philadelphia, requiring them and each of them to appear, and cause to be brought before your Honorable Court, the person and body of Relator and to show the causes for his detention if any they have, and to do and abide by such decisions and orders as your Honorable Court in the premises may direct, and your Petitioner will ever pray.

Hubert Jaegeler.

May 14, 1947.

George C. Dix, New York, New York; Gordon Butterworth, 1500 Walnut Street Building, Philadelphia 2, Penna., Counsel for Relator.

[fol. 12] *Duly sworn to by Hubert Jaegeler. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

RETURN TO WRIT OF HABEAS CORPUS

Now, comes Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, for answer on behalf of Ugo Carusi, Commissioner of Immigration and Karl I. Zimmerman, District Director for District No. 4 at Philadelphia, Pa., and makes return to the writ of habeas corpus.

The respondents are unable to produce before this court the body of the relator, Hubert Jaegeler as is in the said writ commanded for the reason that the said Hubert Jaegeler is not and was not at the time of the issuance of the Writ of Habeas Corpus, in the custody of either of the said respondents.

[fol. 13] The relator, Hubert Jaegeler is presently on parole from the custody of the Attorney General of the United States by virtue of an application for parole made by him on March 12, 1947, a copy of which is attached, marked Exhibit "A". The terms and purposes for which the parole was granted are set forth in a letter to relator dated April 2, 1947, a copy of which is attached and marked Exhibit "B".

Parole was effected on April 15, 1947 at Crystal City, Texas, and was to expire on May 15, 1947; an application of the relator on May 6, 1947 for an extension of parole was denied on May 9, 1947 and relator duly notified thereof on May 13, 1947. At the time of the issuance of the writ relator was at liberty under the said parole. After service of the Writ of Habeas Corpus on the respondents the parole was extended to May 22, 1947 and relator is now at liberty under such extension.

By way of answer to the allegations in the Petition for the Writ of Habeas Corpus issued in this cause, respondents say:

1. The allegations of paragraph one are admitted except that respondents aver that relator is not in custody but on parole as hereinbefore set forth.
2. The allegations of paragraph two are admitted.
3. The allegations of paragraph three are admitted.
4. The allegations of paragraph four are admitted.
5. The allegations of paragraph five are admitted.

6. The allegations of paragraph six are admitted.

7. The allegations of paragraph seven are admitted.

8. Relator was taken into custody by virtue of a Presi-
[fol. 14] dential warrant issued for his apprehension as a potentially dangerous enemy alien. The relator had a hearing before the Alien Enemy Hearing Board, was fully advised of the reasons for believing him to be a potentially dangerous enemy alien and after fully hearing what relator had to say on his own behalf, the Board recommended to the Attorney General that relator be interned. The Attorney General on February 1, 1942 ordered the relator interned after finding him to be a potentially dangerous enemy alien.

9. The allegations of paragraph nine are admitted.

10. The allegations of paragraph ten are admitted.

11. The allegations of paragraph eleven are admitted.

12. The allegations of paragraph twelve are admitted.

13. The allegations of paragraph thirteen are admitted.

14. The allegations of paragraph fourteen are admitted.

15. The allegations of paragraph fifteen are admitted except that relator is not required to surrender himself to the District Director at Philadelphia but is required to depart from the United States by May 22, 1947 or surrender himself at Ellis Island, New York on that date.

16. The allegations of paragraph sixteen are denied. Relator is not in custody of either of the respondents but is at liberty under parole as aforesaid.

17. The allegations of paragraph seventeen are admitted except relator is at liberty under parole as aforesaid.

18. The allegations of paragraph eighteen are denied. [fol. 15] Relator has full knowledge of the cause of his internment and order for his removal.

19. The relator is an enemy alien of the United States and can be compelled to depart from the United States for no other reason than that he is an enemy alien.

20. Admitted.

21. Admitted. Respondents aver that the District Court's jurisdiction is cumulative.

22. (a) Denied.

(b) Admitted.

(c) Admitted.

(d) Relator was in custody and was without power to do otherwise.

(e) Denied.

(f) Denied.

(g) Denied.

(h) This averment is immaterial.

(i) Denied. Relator is not a citizen of the United States.

(j) Denied. Relator is an enemy alien of the United States.

(k) Denied.

[fol. 16] (l) Denied.

(m) Denied.

(n) Denied.

(o) Denied.

(p) Denied.

(q) Denied. Relator is still an enemy alien of the United States.

23. Respondents admit habeas corpus is proper procedure to determine the cause of relator's detention if he is detained. Respondents aver relator is not detained but is on parole as hereinbefore set forth.

24. The allegations of paragraph twenty-four are admitted. Respondents aver that relator has appealed the dismissal of the Writ of Habeas Corpus in Civil Cause M-1171.

25. The allegations of paragraph twenty-five are denied.

26. The respondents cannot produce the body of the relator because he is not in the custody of either of them.

27. Relator's petition fails to set forth a cause of action justifying the relief prayed.

Wherefore, respondents pray that the Writ of Habeas Corpus be dismissed.

Gerald A. Gleeson, United States Attorney.

[fol. 17] EXHIBIT "A" TO RETURN TO WRIT OF HABEAS CORPUS

Dist. File No. 935/540.
C. O. File No. 39/495.
D. J. File No. 146-13-2-62-15

This is to acknowledge that ——

(1) Upon May 3, 1946 I was served with an order of the Attorney General dated ———— directing my removal from the United States pursuant to the authority contained in the Alien Enemy Act of 1798, Presidential Proclamation of July 14, 1945, and regulations issued thereunder.

(2) I have not heretofore applied for parole, and on March 12, 1947 I was offered parole for a period of 30 days without restraints other than the requirement that I report to and keep the Immigration and Naturalization Service informed of my whereabouts during said period of parole, and I understand that said parole is granted for the purpose of enabling me to arrange my affairs incident to effecting my departure from the United States.

(3) I am willing to accept parole for the following reasons:

Subject to the objection of my attorney I am willing to accept a 30 day parole to Philadelphia, Pa. to take care of business and personal affairs.

(4) I am ———— a party to litigation concerning the right of the Government to cause my removal from the United States, and the nature and status of such litigation is as follows:

[fol. 18] (5) I do ——— intend to depart from the United States in accordance with the aforementioned order. (If in the negative, give your reasons.)

I do not care to make a statement in regard to question #5 and am signing this statement subject to the approval or objection of my attorney. Should it be inevitable that I depart from the U. S. then I will do so.

(s/d) Hubert Jaegeler (Name) Hubert Jaegeler.

Witness: (s/d) E. D. McAlexander.
Date: March 12, 1947.

EXHIBIT "B" TO RETURN TO WRIT OF HABEAS CORPUS

U. S. Department of Justice, Immigration and Naturalization Service, Crystal City Internment Camp, Crystal City, Texas

April 2, 1947.

File No. 935/540.

Mr. Hubert Jaegeler, Crystal City Internment Camp, Crystal City, Texas.

DEAR MR. JAEGELER:

Your attention is invited to the fact that, under the terms of your removal order, you may proceed to any country of your choice, if arrangements can be made. No exit permit is required to leave this country, and you are (and have been) free to depart at any time under such order.

[fol. 19] The thirty (30) day parole offered is to afford you opportunity to make arrangements to depart from the United States and/or settle any necessary business and personal affairs. Upon arranging to enter another country, you must notify the Immigration and Naturalization Service of the place and date of intended departure, so that your departure may be verified.

Should you be unsuccessful in departing from the United States, or if you decline parole, immediate steps will be taken to proceed with removal arrangements. If you are involved in litigation, actual removal will take place as soon as such litigation has reached a point where our Department feels it is no longer bound to delay such action.

No extension of the thirty (30) day parole can be granted you because of failure to secure permission to enter some other country. However, if after diligent effort, you are unable to dispose of personal and business affairs, the Central Office will consider an extension.

Yours very truly, L. T. McCollister, Acting Officer in Charge.

In United States District Court

Traverse

To the Honorable Judges District Court of Eastern District of Pennsylvania:

Relator for his Traverse to the Return herein respectfully alleges:

1. Relator denies the allegations of Paragraph No. 15 of the return because in letters dated May 15, 1947, and May [fol. 20] 21, 1947, the Respondents have extended Relator's parole to June 2, 1947.

2. Relator denies the allegation of Paragraph No. 19 of Return.

3. Relator submits that the jurisdiction of the District Court is not merely cumulative as averred in Paragraph No. 21 of the Return, but being a legally admitted resident of the United States he is entitled to trial in a Court or to a full and fair hearing before being removed from the Country.

4. Relator denies the allegations of Paragraph No. 22 (d) of the Return and reaffirms that his compliance with the presidential orders as well as all other laws was of his own volition.

5. Relator traverses all the denials contained in Paragraph No. 22 of the Return.

6. Relator denies that he is or has been free to proceed to any Country of his choice and denies that he has been free to depart at any time under the removal order.

7. Instead of permitting Realtor to depart from the United States the Respondents acting on their own initiative or under instructions or in cooperation with the Attorney General or the State Department have effectively prevented and in the future intend to prevent Relator from departing to any Country of his own choice and intend to deport him to Germany. This has been, and is being, accomplished by the use of three lists prepared by the Attorney General and State Department which lists have been circulated and distributed among the Governments of

all American and European Countries by the State Department. Said three lists are as follows:

[fol. 21] (a) A list containing the names of 51 persons brought to the United States from Central and South American Countries during hostilities for internment.

(b) Another list containing the names of 417 persons resident in the United States, some of whom are native born.

(c) The third list contains approximately 600 names of persons domiciled in Spanish-America who were brought to the United States from other American Republics during hostilities and were then exchanged to Europe for American Nationals and, who now with their native born American wives and children are in Germany and trying to return to their domiciles in the Western Hemisphere.

In connection with the distribution of said lists the Secretary of State has informed the Governments of such Countries that he deems the return of such persons to be prejudicial to the future security and welfare of the Americas, and that he wishes the said Governments to refuse to issue to said persons visas or permissions to immigrate. In conformity with the said requests of the Secretary of State, such other Governments have refused to issue Visas or travel documents to said persons, and in several cases where they had already issued Visas, they yielded to the demand of the Secretary of State that said permissions be cancelled.

After the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of "Ex. Rel. Hans VonHeyman vs. Watkins," 159 Fed. 2d 650, holding that the detention of Relator for the purpose of removing him to Germany was unlawful because he had been denied an opportunity to depart voluntarily from the United States, the Secretary of State, through his Embassies, informed each of the other American Governments that the release of internees on parole to enable them to depart voluntarily was merely a technicality and that upon expiration of their thirty day paroles, the internees would be reapprehended [fol. 22] and deported to Germany. At the same time the Secretary of State, through his agents, informed the other American Governments that he did not wish the return of

any of the persons named on the lists to any other American Republic.

Relator's name appears on the list of 417 residents of the United States. Relator has been informed by his attorneys that by reason of such procedure it is useless for him to make application to any Consul to go to any other American Country, or any European Country other than to Germany, and Relator does not desire to return to Germany. Relator alleges that as long as such restraint continues he is not able to depart from the United States voluntarily to a Country of his choice and is therefore unlawfully restrained of his liberty by Respondents.

8. In December 1945 the Allied Control Council asked that relators and other persons deemed by the Attorney General to be dangerous be delivered to their country of origin, in violation of existing extradition treaties.

9. On April 12, 1946 the Emergency Advisory Committee for Political Defense, of which the United States is a member, adopted Resolution XXVI on the Expulsion and Non-Admission of Dangerous Persons. Said resolution sets forth the circumstances that exempt from expulsion or suspend the effects of the measure. They are: adherence to the Axis by coercion; retraction of adherence to the Axis; and personal or family situation, such as that the spouse or children of the allegedly dangerous persons are nationals of an American Republic, or that expulsion would endanger the person's life because of the state of his health.

10. That he would also be compelled, as have been others, to appear before an extra-ordinary tribunal or court set up [fol. 23] by our Military authorities, although he could not so be compelled here in the continental United States.

Gordon Butterworth, George C. Dix, of Counsel for the Relator.

23 May 1947.

IN UNITED STATES DISTRICT COURT

MEMORANDUM

Before Kirkpatrick, J. (July 15, 1947.)

Most of the questions of law raised by the relator have already been decided against him by various courts of the United States, some of them, many times. The only one of them which need be mentioned is that based upon the restrictive phrase "Whenever there is a declared war" with which the Enemy Alien Act begins.

When Congress passed the Act the members believed that they stood upon the threshold of war. It was also anticipated, with reason, that hostilities might begin and continued over an indefinite time without a formal declaration of war. Congress was also confronted with what it conceived to be the constitutional limitation of Article 1, Section 9 of the Constitution and for that reason, as well as possibly a reluctance to commit the assumption of the drastic powers of the Act to judgment of the President alone, chose to make the executive power dependent upon the existence of a "declared" war or actual or threatened invasion.

It is not likely that Congress was oblivious of the possibility that actual hostilities might end before a peace treaty became effective to end the "declared" war. Nevertheless they put no terminal limitation upon the power of the President short of the end of the declared war, al- [fol. 24] though they might easily have limited it to the end of hostilities. It seems, therefore, that the intention of Congress was to make the powers of the President coincide and end with a state of war in the technical sense—begin with the declaration and end with the treaty. The fact that the aliens subject to the presidential power were described as native or subjects of the "hostile" nation does not indicate a different intention. The words are naturally and logically descriptive of subjects of a nation as to which a state of war exists and avoid circumlocution.

However, the traverse raises the fact question that, by reason of physical restraint, plus action of the State Department by which all American and foreign governments

have been induced to refuse visas to the relator, he is not able to depart from the United States voluntarily to a country of his choice. The Alien Enemy Act authorizes the President to "provide" for the removal of only such enemy aliens who, not being permitted residence in the United States, neglect or refuse to depart therefrom. The substance of the traverse is the President is "providing" for the relator's removal to Germany before he has refused to depart. Of course, he has refused and is refusing to go to Germany but his position is that the refusal contemplated by the Act means refusal to leave the country after free opportunity has been afforded him to go where he pleases.

The question thus raised was alluded to at the argument but was not fully discussed. I think it proper the fact issue be tried.

[fol. 25] IN UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION TO DISCHARGE THE WRIT AND IN THE ALTERNATIVE, TO PREVENT THE TAKING OF THE DEPOSITION OF THE SECRETARY OF STATE

The defendants move the Court to discharge the writ of habeas corpus herein and, in the alternative, to make an order that the deposition of George C. Marshall, Secretary of State, proposed by the relator herein, shall not be taken.

The grounds for the motion to discharge the writ are that the allegations of the pleading herein, as amplified and explained by the affidavits filed in support hereof, show that there is no genuine issue as to any material fact and that the defendants are entitled to the discharge as a matter of law.

The grounds for the motion, in the alternative, to prevent the taking of the deposition of the Secretary of State are that all material facts sought to be elicited by relator's proposed interrogatories are fully set forth in the affidavits filed herewith, and that all other inquiries made therein are irrelevant and seek to subject the Secretary to judicial inquiry into aspects of the official conduct by the Department of State of foreign affairs which are privileged.

This motion is based upon the record and files herein, together with the affidavits filed in support hereof and the Memorandum of Points and Authorities in support thereof.

Gerald A. Gleeson, United States Attorney; James P. McCormick, Assistant United States Attorney. Of Counsel: Enoch E. Ellison, Special Assistant to the Attorney General; Paul J. Grumbley, Attorney, Department of Justice.

[fol. 26] AFFIDAVIT

Edward E. Hunt, being duly sworn, says: That he is the Chief of the Division of Protective Services of the Department of State and is familiar with the Department's program for repatriating to Germany certain Germans who had been deported to the United States from certain Latin American countries during and immediately after the war and with the action taken by the Department in connection with such program;

That he has examined a copy of the traverse to the defendant's return to the petition for a writ of habeas corpus filed by United States of America, ex rel. Hubert Jaegeler, Relator, against Ugo Carusi, Commissioner of Immigration and Naturalization at Philadelphia, and Carl Zimmerman, District Director for District No. 2, at Philadelphia, particularly the allegations contained in paragraphs 6 through 9 thereof;

That he has no knowledge or information concerning the allegations made in paragraph 6 of the said traverse;

That, with respect to the allegations made in paragraph 7 of the said traverse, he denies that the Department of State intends to prevent Relator from departing to any country of his own choice;

That it is true that there have been circulated and distributed by the Department among the governments of all of the American Republics and Canada lists containing the names of alien enemies, 417 of whom were residents of the United States and 51 of whom were brought to the United States from the other American Republics, whose continued presence in the Western Hemisphere was found, after proper hearings, to be dangerous to continental security, and that it has been suggested by the governments of

those countries that their consulates be instructed not to [fol. 27] grant visas to those persons pending their removal to Germany and that Relator's name appeared on the list of 417 referred to above. In taking such action, the United States was complying with the provisions of Resolution VII of the 1948 Inter-American Conference of Mexico City which called upon the American Governments to prevent such persons from further residing in the hemisphere. A certified copy of a memorandum sent by the Department of State to its missions and transmitted by them to the Foreign Offices of the Governments of the several American Republics and Canada is attached as Exhibit One. A copy of Resolution VII of the 1945 Inter-American Conference of Mexico City is attached as Exhibit Two;

That thereafter the Officers in Charge of the American missions at London, Bern, Stockholm, Paris, Madrid and Lisbon were urged to call the exclusion program to the attention of the Foreign Offices and to transmit to them copies of the lists herein referred to. The governments of these countries were not requested to give assurances such as were asked of the American Republics with respect to the admission of the aliens into their territory. However, the Officers in Charge were instructed to add that this Government was confident that the Governments of the European countries involved would not want to grant visas to the aliens to enter their territories. A copy of a note sent to the Federal Political Department of Switzerland by the American Legation at Bern, June 20, 1946, and representative of notes sent by American missions to the Ministries of Foreign Affairs at London, Stockholm, Paris, Madrid, and Lisbon in June 1946, is enclosed as Exhibit 3;

That the Secretary of State has no authority to require a foreign government to refuse a visa for, or to cancel a visa issued to, any person;

That following the decision of the United States Circuit Court of Appeals for the Second Circuit on January 17, 1947 in the case of *United States, ex rel. Von Heymann v. Watkins*, the Department on March 4, sent a circular telegram [fol. 28] to all American missions in the other American Republics, instructing them to bring to the attention of the Foreign Offices the action of the United States District Court in New York in ordering the temporary release of

certain of the enemy aliens from the American Republics, at the same time reminding the Foreign Offices that this release was a legal technicality and did not mean that the Department had changed its views regarding their dangerousness or that they should be permitted to remain in this Hemisphere, it being the intention of this Government to transport them to Germany as soon as the legal situation permitted.

That on March 7, 1947 another circular telegram was sent to all American missions in the other American Republics, informing them that the enemy aliens from the American Republics not listed in the circular telegram of March 4, 1947 would be given the same opportunity to leave the country as those listed in the earlier telegram.

That on February 6, 1948, subsequent to the memorandum opinion of the United States District Court for the Southern District of New York in the case of *United States, ex rel. Friedrich Bank, Relator v. Watkins, Respondent, and United States, ex rel. Ida A. Bank, Relator v. Watkins, Respondent*, in the United States District Court for the Southern District of New York on August 5, 1947, the Department sent a circular airgram to all American Diplomatic Officers in the other American Republics and Canada quoting in full the opinion of the Court in the Bank case and requesting such officers to furnish the Foreign Offices in each of the Western Hemisphere countries with a note conforming to a draft which was enclosed informing the Foreign Offices that the Department without in any way receding from this Government's commitments made at regional conferences desired to make it clear to all of the American Republics and Canada that the United States Government was in no way preventing the individuals in question from leaving the United States for any other American Republic or Canada, if any of these countries desired to issue a visa [fol. 29] permitting the entry of the individual. A copy of the note transmitted by each of the American missions to the Foreign Offices of the other American Republics and Canada is attached and marked Exhibit Four;

That, with respect to the allegations made in paragraph 8 of the said traverse, no action taken by the Department of State with respect to the Relator or other persons herein referred to was initiated at the request of or as a part of any

program adopted by the Allied Control Council, nor is any action taken either by this Government or by the Control Council with respect to such person considered by the Department to have been in violation of any extradition treaties or of any other international agreements to which this Government was a party at the time such action was taken.

That it is correct that on April 12, 1946 the Emergency Advisory Committee for Political Defense, of which the United States is a member, adopted Resolution XXVI on the Expulsion and Non-Admission of Dangerous Persons. However, the circumstances set forth in the traverse as exempting from expulsion or suspending the effects of the measure are applicable under the terms of the Resolution only in limited instances set forth therein. A copy of this Resolution is attached and marked Exhibit Fi[illegible].

Edward E. Hunt, 7-26-48.

Subscribed and sworn to before me this 26th day of July, 1948. Frances Jean Espe, Notary Public, District of Columbia. My Commission Expires Oct. 1, 1951. (Seal.)

[fol. 30] No. 7968

UNITED STATES OF AMERICA

(Seal)

DEPARTMENT OF STATE

To All To Whom These Presents Shall Come, Greeting:

I Certify, That Edward E. Hunt, whose name is subscribed to the document hereunto annexed, was at the time of signing the same Chief of the Division of Protective Services of this Department.

In Testimony Whereof, I, George C. Marshall, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the City

of Washington, in the District of Columbia, this twenty-seventh day of July, 1948.

George C. Marshall, Secretary of State, by M. P. Chauvin, Authentication Officer, Department of State. (Seal)

[fol. 31] EXHIBIT "1" TO AFFIDAVIT

MEMORANDUM TRANSMITTED BY THE AMERICAN MISSIONS TO THE FOREIGN OFFICES OF THE GOVERNMENTS OF THE SEVERAL AMERICAN REPUBLICS AND CANADA, MAY 1946

In order to cooperate with the other American Republics to secure the safety and welfare of this hemisphere, and to effectuate the principles and policies designed to that end which were adopted by the American Republics at the Mexico City Conference, the Government of the United States is prepared to proceed with its program to exclude from this hemisphere dangerous enemy aliens who are presently in the United States.

The Government of the United States, acting through the Department of Justice has given careful consideration to the cases of a large number of German nationals resident in the United States. After giving each individual an opportunity for a hearing before a board, the Attorney General has determined that 417 persons are dangerous to the public peace and safety of the United States because they have adhered to an enemy government, or to the principles of government thereof, and has ordered that they be removed. It is considered that the exclusion from the hemisphere of these individuals will effectuate the purposes of Resolution VII of the Mexico City Conference. A list of the individuals is provided in Enclosure 1.

There is an additional, smaller group of aliens whom the United States desires to include in this program, consisting of German nationals sent to this country from other American Republics for security internment during the war. Of the aliens originally brought here from the other republics, a high proportion—about three-fourths—have already been [fol. 32] repatriated to Germany with their consent. Of the remaining one-fourth, those from three republics, namely

Bolivia, Equador and El Salvador, have, upon the request of those governments, been returned to those countries for disposition of their cases; 87 percent of the rest have been released from confinement by the Government of the United States because, after consideration of the information in each case, it was determined that although their internment was justified and probably necessary during hostilities they might now safely be allowed to remain in the hemisphere.

There remain in the custody of the Government of the United States a total of 51 cases from ten countries; the names of these individuals are listed in Enclosure 2. In these cases, after the most careful study of all the available evidence, and after a hearing before a board established by the Department of State, the Secretary of State, acting for the President, has concluded that the continued residence of these individuals in the Western Hemisphere would be prejudicial to the security and welfare of the Americas within the meaning of Resolution VII of the Mexico City Conference, and that accordingly, as contemplated by all the American Republics at that conference, these individuals also should be excluded from the hemisphere.

Since making the determinations in these cases, the Government of the United States has received Resolution XXVI of the Inter-American Emergency Advisory Committee for Political Defense dated April 12, 1946. This resolution, entitled "On the Expulsion and Non-Admission of Dangerous Persons," recommends uniform standards to be applied by every American Republic in the conduct of its exclusion program. This Government is pleased to note that the standards which have been applied by the United States to both groups of aliens under discussion approximate closely those recommended by the Committee.

The Government of the United States desires in the near future to issue orders to the persons listed in the enclosures requiring them to depart from the United States within a [fol. 33] period of thirty days, and providing that if they neglect or refuse so to depart they will be removed to Germany. (This procedure is dictated by the internal laws of the United States under which this program is contemplated.) Before issuing such orders, however, the Government of the United States is desirous of receiving from the other American Republics and from the Dominion of Can-

ada assurances that the persons in question will not be permitted to enter their territory. Such assurances by your Government would be greatly appreciated by the Government of the United States as an act of cooperation in the application of Resolution VII. To effectuate these assurances, it is respectfully suggested that precise instructions be sent to the appropriate Consulates in the United States, especially those in New York, New Orleans, and San Antonio or Houston, Texas. The Department of State will gladly furnish copies of the enclosed lists to your Embassy in Washington for distribution to the Consulates.

It would be futile for the United States, or for any other American republic, to exclude a dangerous individual if that individual could proceed to another country in the hemisphere and carry on his activities there. Obviously, a program for the exclusion of dangerous persons such as was contemplated by Resolution VII of the Mexico City Conference, can be effectively carried out only if all the American republics cooperate to that end. The Government of the United States is confident that your Government will act to insure the success of the steps my Government is taking in support of the program to which the American Republics committed themselves at Mexico City.

EXHIBIT "2" TO AFFIDAVIT

Note: Exhibit 2 (Resolution VII of the Final Act of the Inter-American Conference on Problems of War and Peace) *Omitted.*

[fol. 34] EXHIBIT "3" TO AFFIDAVIT

Copy of Note Sent to the Federal Political Department of Switzerland by the American Legation at Bern, June 20, 1946, and Representative of Notes Sent by American Missions to the Ministries of Foreign Affairs at London, Stockholm, Paris, Madrid and Lisbon; June, 1946.

The Legation of the United States of America presents its compliments to the Federal Political Department and,

acting under instructions from its Government, has the honor to invite the attention of the Federal Political Department to steps taken by the United States Government to exclude from the Western Hemisphere German nationals deemed to be dangerous to the security of the Western Hemisphere. These steps are outlined in the attached memorandum, to which are annexed two lists of German nationals mentioned in the memorandum.

In bringing the subject expulsion program to the attention of the Federal Political Department, the Legation is directed to state that the listed individuals have been found by the Government of the United States to be German nationals dangerous to the welfare and security of the Western Hemisphere and that the United States Government intends to repatriate them to Germany—a step which accords with the program of the Allied Control Council for Germany in effecting the return of dangerous Germans. It may be recalled that the latter program, certain aspects of which are embodied in a resolution of the Allied Control Council for Germany dated September 10, 1945, was the subject of the Legation's note No. 2208 of September 22, 1945.

Inasmuch as careful investigation has shown that the [fol. 35] individuals named in the attached lists are dangerous to the security of the Western Hemisphere, the Government of the United States is confident that the Government of Switzerland will not wish to grant them visas to enter its territory, should any of these aliens seek to escape deportation from the United States or attempt to leave Germany after arrival there. The Department of State has expressed its willingness to furnish copies of the enclosed lists for distribution to Swiss consulates. It would be appreciated if the Federal Political Department would be willing to cooperate with the United States Government in the manner set forth above, thereby to assist in attaining the desired objective through the implementation of the expulsion program.

The Legation avails itself of this occasion to renew to the Federal Political Department the assurances of its highest consideration.

Bern, June 20, 1946.

EXHIBIT "4" TO AFFIDAVIT

Note: Exhibit 4 (Letter dated February 26, 1948 to Foreign Minister from Ambassador) *Omitted.*

[fol. 36] EXHIBIT "5" TO AFFIDAVIT

Resolution XXVI of the Inter-American Emergency Advisory Committee for Political Defense, on Expulsion of Dangerous Persons Approved April 12, 1946.

Subsections (a) and (b) of Sec. 3 consider these circumstances as warranting exemption from expulsion.

b. *Personal or family situation.*

In cases where, on account of expulsion or repatriation, the life of the person expelled might be seriously endangered because of illness or advanced age, it is also advised that the measure be suspended. (Section 3, subsection -d) of this Resolution.)

Another special circumstance, among those most frequently invoked to escape expulsion, is that the spouse or children of the dangerous person are nationals of an American Republic.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS WRIT OF HABEAS CORPUS, OR IN THE ALTERNATIVE, TO PREVENT THE TAKING OF THE DEPOSITIONS OF THE SECRETARY OF STATE.

Gordon Butterworth, being duly sworn according to law, deposes and says that:

[fol. 37] He is of Counsel of Record for the Relator, Hubert Jaegler, herein, and

That he is familiar with the pleadings heretofore had herein, and in reply to Defendants' Motion above, avers and replies, as follows:

(1) As to the Motion to dismiss the Writ

This Court, in its Memorandum Opinion, dated July 15, 1947, has held that there is a triable issue of fact, and

awarded an issue. We aver that the Order of Court of July 15, 1947, is res adjudicata of the question as to whether there is a triable issue of fact, and whether there shall be a trial of that issue. The case was at that time ready for trial except that Relator averred certain facts, the proof of which were within the exclusive custody of Defendants. The Court allowed interrogatories to issue, directed to Defendants, to enable Relator to properly prepare and try the said issue of fact, i. e., "was Relator restrained." The Defendants have submitted Affidavits which they claim contain all the material facts to be elicited from the Secretary of State, and that, therefore, there is no further issue to be tried. Examination of the moving Affidavits show, however, that denials do not go to the entire affirmative allegations made on behalf of Relator, but only deny immaterial parts, for instance, the Affidavit of Mr. Hunt does not deny the allegations contained in Paragraph Seven (7) of Relator's Traverse, that "The Attorney General or the State Department *has effectively prevented* * * *, Relator, from departing to any country of his own choice * * *." Mr. Hunt's Affidavit merely denies that the Department of State intends to do this in the future.

Mr. Hunt's Affidavit does not state that he is familiar with the Department's program relating to persons legally [fol. 38] resident in the United States, which is Relator, Jaegler's case.

We averred that the instructions to the Consulates not to grant Visas were suggested by the State Department of the United States, whereas Mr. Hunt states, "It has been suggested by the Governments of those Countries"; this, it is averred is, in itself, a material issue of fact.

It is averred that Resolution VII, of the 1945 Inter-American Conference of Mexico City, (known as the Act of Chapultepec), is neither a law, treaty, nor an effective egreement, but is merely a recommendation which has never been submitted to, nor ratified, nor otherwise approved by Congress. That it was an emergency wartime measure which no longer has validity because it has been superseded by the Inter-American Treaty of Reciprocal Assistance, filed at Rio de Janeiro on September 2, 1947. The

State Department Bulletin for November 23, 1947, at page 983, says:

> "The Act of Chapultepec was, however, a temporary wartime measure in the form of a simple resolution and was concluded prior to the time when the adoption of the Charter of the United Nations set the permitted patterns for regional security arrangements."

While Mr. Hunt has furnished the Court with Exhibit No. 3, distributed to European Countries, he has failed to furnish a copy of a letter submitted to Steamship and Airplane Companies, by the State Department, dated July 1, 1946, which was used to influence said Transportation Companies so that they would refuse to transport alien enemies, including Relator Jaegler . A copy of such circular letter is annexed hereto as Exhibit "A," and made part hereof.

Defendants do not aver that the requests made to the Transportation Companies, or the suggestions to the other Countries had been revoked prior to the notice to depart [fol. 39] served on Relator, Jaegler, or prior to the issuance of the Writ of Habeas Corpus, herein, May 15, 1947.

It is averred that Relator, Jaegler, at such time, tried to obtain Visas and was refused by reason of the fact that his name appeared on the list of 417 enemy aliens, as is more particularly set forth in the Traverse. It is averred that such action by Defendants was not an isolated instance of procedure, but a general course of action applied in many cases.

Defendants have not annexed to their moving papers, in support thereof, any Exhibits or proof that "It has been suggested *by the Governments* of those Countries that their Consulates be instructed not to grant visas." Affiants have affirmed that the suggestion came from our State Department, and not from the other Governments, and an issue of fact is therefore raised.

Affiants aver that the Defendants have not denied the material allegations that the Attorney General and State Department, acting together, have, in the past, prevented Relator from departing from the United States to a country of his own choice. That was the issue raised by the pleadings. There being no denial of these material facts, (1) the

Writ should be sustained, or (2) the Relator should be given an opportunity as provided in the Memorandum Opinion of this Court, dated July 15, 1947, to try the issue of fact, i. e., to prove that there has been actual interference with his right of voluntary departure.

(2) As respects the Defendants' alternative Motion

This Court, on June 8, 1948, allowed the Interrogatories to issue, returnable within sixty (60) days. No Answers to the interrogatories have been filed or served. Instead, Defendants, on August 5, 1948, seek, by Dilatory Motion, more than 10 days thereafter to [fol. 40] avoid the necessity of answering the questions by moving alternatively that the Depositions of the Secretary of State should not be taken. Since Relator has not asked to take the Depositions of the Secretary of State, the Motion is not in order. Defendants are in default, in failing to file Answers to the Interrogatories heretofore approved by this Court, within sixty days from June 8, 1948, Rule 33.

Defendants have not averred what Answers to Relator's Interrogatories are privileged, but answers, ignores or denies knowledge of them.

Wherefore, Relator submits that Defendants' Motions be both dismissed, and the Writ of Habeas Corpus issue, or in the alternative, the Defendants be required to answer the Interrogatories fully, and thereafter the case be listed for trial of the issue of fact.

Gordon Butterworth.

Sworn to and subscribed before me this 3rd day of September, A. D. 1948. Rae W. Dawson, Notary Public. My Commission Expires March 5, 1949. (Seal.)

[fol. 41] EXHIBIT "A" TO RELATOR'S AFFIDAVIT

July 1, 1946.

Alcoa Steamship Company, 17 Battery Place, New York City.

SIRS:

Your attention is called to certain circumstances arising in the conduct of a program in which the Government of the United States is currently engaged.

In Resolution VII of the Final Act of the Mexico City Conference of March 1945, the American republics declared their intention to exclude from the Western Hemisphere Axis nationals whose continued residence in the Hemisphere would be prejudicial to the security and welfare of the Americas.

The United States Government has now determined that certain German nationals presently interned in the United States are dangerous to hemispheric or national security. (The names of these German Nationals, arranged according to the country in which the individuals resided prior to his internment, will be found in the attached lists.) As a result of this determination, the Government is issuing orders directing these individuals to depart from the United States within thirty days, and stating that if at the end of that period the alien will not have effected this departure, he will be removed to Germany.

Such orders, signed by the Secretary of State or by the Attorney General, are currently being served on the aliens involved. It is expected that immediately after the service many of the individuals listed, especially among those who previously resided in South or Central America will apply for transportation to one of the other American republics or to Canada. Some of these aliens will undoubtedly pre-[fol. 42] sent visas purporting to grant them permission to enter one of these countries. You are informed, however, that the Governemnt of Canada and almost all of the governments of the other American republics have indicated that in order to further hemispheric security they will not grant visas to enemy aliens excluded by the United States, and will nullify any visas already issued to such individuals.

It is important, therefore, that you exercise great care in examining visas presented by any of the aliens listed, to make certain that such documents are currently valid, and that it is the present intention of the Government which issued the visa to allow the individual to enter its territory. Documents ante-dating June 1, 1946, for example, may, in many instances, prove to have been cancelled by the issuing government. In any case as to which doubt exists, the Alien Enemy Control Section of the Department of State will gladly make the inquiries necessary to determine whether the government in question will admit the individual seeking transportation.

This letter is not to be construed as a request that you deny to any individual transportation to a country which is actually willing to admit him.

Very truly yours, for the Secretary of State: Louis Henkin, Acting Chief, Alien Enemy Control Section.

IN UNITED STATES DISTRICT COURT

ORDER

Sur Defendants' Motion to Discharge the Writ and, in the alternative, to prevent the taking of the deposition of the Secretary of State.

And now, to wit, this 30th day of September, 1948, upon [fol. 43] consideration of the foregoing motion, it is ordered that Defendants' Motion to Discharge the Writ be and is hereby denied.

It is further ordered that Defendants' Motion to prevent the taking of the deposition of the Secretary of State be and is hereby granted.

By the Court, Kirkpatrick, C. J.

In United States District Court

Petition for Rehearing on Defendants' Motion to Discharge the Writ, Etc.

The Petition of the defendants, by Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania respectfully represent:

1. That the above captioned proceedings is a Petition for a Writ of Habeas Corpus filed by the relator on May 15, 1947:

2. That on August 13, 1948 the defendants moved to discharge the Writ and in the alternative, to prevent the taking of the depositions of the Secretary of State:

3. That on September 30, 1948, your Honorable Court made an Order, denying defendants' Motion to Discharge the Writ, etc.;

4. That since the making of the Order of September 30, 1948, by your Honorable Court, the exact questions raised by defendants in their Motion to Discharge the Writ were passed upon by the United States Circuit Court of Appeals, for the Second Circuit in the case of United States of Amer-
[fol. 44] ica, ex rel. Dorfler et al. vs. Watkins, 171 F. (2d) 431, the determination in said case being adverse to the position taken by the relator in the above captioned matter:

5. That on May 31, 1949 a petition by Dorfler for certiorari was denied by the Supreme Court:

6. That your Petitioners believe that in view of the determination made in the above mentioned Dorfler case by the Circuit Court of Appeals for the Second Circuit and by the Supreme Court of the United States, the Order made by your Honorable Court should be reconsidered and re-argument had on the questions raised by defendants in their Motion to Discharge the Writ:

Wherefore, your petitioners pray that your Honorable Court order the Motion to Discharge the Writ for reargument and reconsideration.

Gerald A. Gleeson, United States Attorney.

In United States District Court

Answer to Petition for Rehearing on Defendants' Motion to Discharge the Writ of Habeas Corpus

Relator, by his counsel of record, George C. Dix and Gordon Butterworth, Esquires, makes answer to Defendants' Petition to Discharge the Writ and avers as follows:

1. The facts in Paragraph 1 of the Petition are admitted. [fol. 45] 2. The facts in Paragraph 2 of the Petition are admitted.

3. The facts in Paragraph 3 of the Petition are admitted.

4. The facts set forth in Paragraph 4 of the Petition are denied. It is averred that the Circuit Court of Appeals for the Second District rendered an Opinion in the case of United States of America, Ex Rel. Dorfler, et al. vs. Watkins, 171 F. (2) 431, but Relator avers that the facts in that case were not the same as the facts in the instant case and are, therefore, not governing.

5. The facts set forth in Paragraph 5 of the Petition are admitted.

6. Denied. Relator replies and avers that the decision in the Dorfler case is not authority for a similar decision in the instant case and avers that the Order previously made by your honorable Court on September 30, 1948 should not be reconsidered and reargued on the authority of the said Dorfler case.

George C. Dix, Gordon Butterworth, of Counsel.

In United States District Court

Order

And Now, to wit: this 9th day of October, 1950, this matter having come before the court on respondents' Motion for a reargument and reconsideration of the Motion of August 5, 1948 to discharge the writ, it is

[fols. 46-49] Ordered and Decreed

that reargument upon the Motion of August 5, 1948 is Granted, and it is further

Ordered and Decreed

that respondents' Motion of August 5, 1948 be Granted, and it is further

Ordered and Decreed

that the Writ of Habeas Corpus issued in the above matter on May 15, 1947 be and the same is hereby Dismissed, and it is further Ordered that the relator be and hereby is remanded to the custody of the respondents.

By the Court, Kirkpatrick, J.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given by Hubert Jaegeler, Relator above, by his Counsel of Record, Gordon Butterworth, he hereby appeals to the Third Circuit Court of Appeals from the Order of the United States District Court for the Eastern District of Pennsylvania, entered in this action on October 9, 1950 dismissing the Writ of Habeas Corpus issued in the above entitled matter on May 15, 1947 and remanding the Relator to the custody of the Respondents.

Gordon Butterworth, Esquire, Attorney for Relator,
1500 Walnut Street, Philadelphia 2, Pa.

December 5, 1950.

[fol. 50] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,373

UNITED STATES OF AMERICA ex rel. HUBERT JAEGELER, Appellant,

vs.

UGO CARUSI, Commissioner of Immigration and Naturalization, and KARL I. ZIMMERMAN, District Director Immigration and Naturalization Service, Appellees.

Appeal from the Final Order of the United States District Court for the Eastern District of Pennsylvania, Dismissing Habeas Corpus.

Argued March 5, 1951.

Before Goodrich, McLaughlin and Hastie, Circuit Judges

OPINION OF THE COURT—Filed April 2, 1951

By McLAUGHLIN, Circuit Judge.

This is an appeal from the dismissal of a writ of habeas corpus by the court below.

Appellant is a German national. He came to this country as a quota immigrant in 1925. With the exception of a visit to Germany in 1933 he seems to have been here ever since. On December 9, 1941, he was taken into custody as an enemy alien. Following a hearing before an Alien Enemy Hearing [fol. 51] Board at Philadelphia, and on the Board's recommendation to the Attorney General, appellant was interned for the duration of the war emergency.

In October 1945, at his request, he was given a hearing before a Repatriation Hearing Board. That Board recommended his removal from the United States because "he was determined to be dangerous to the public peace and safety of the United States." On May 3, 1946 appellant was notified by the Attorney General of a direction for his removal. On April 2, 1947 he was advised by the Immigration and Naturalization Service of the Department of Justice that under the terms of his removal order he could

proceed to any country of his choice "* * * if arrangements can be made." On April 15, 1947 he was given a thirty day parole to afford him an opportunity to make such arrangements. He was further advised that if he was unsuccessful in departing from the United States immediate steps would be taken to proceed with removal arrangements and that no extension of the thirty day parole could be granted because of failure to secure permission to enter some other country.

On May 15, 1947 his petition for a writ of habeas corpus was filed. The writ was allowed on June 16, 1947. Thereafter there was a motion to dismiss which was denied. A motion for reargument was also denied. Following that, considerable time necessarily elapsed in connection with awaiting the progress to, and decision by, the Supreme Court of a case which in some respects resembled the one at bar.[1] Finally, on October 9, 1950, the writ of habeas corpus was dismissed.

Appellant in his first point complains of the hearings accorded him on the ground that they did not conform to judicial procedure.

The President's power to act, as he here acted, stems out of the Alien Enemy Act of 1798 which, with some inconse- [fol. 52] quential amendments, is the law today. That statute reads:

> "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the

[1] United States ex rel. Dorfler et al vs. Watkins, 2 Cir., 171 F2d 431, cert. denied 337 U. S. 914.

United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety." (Act of July 6, 1798, 1 Stat. 577, R.S. Sec. 4067, as amended, 40 Stat. 531, 50 U.S.C. Sec. 21.).

Proceeding under this Act, in 1945, the President issued his Proclamation 2655, 10 Fed. Reg. 8947. This directed the removal from the United States of all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States". It was under that proclamation that appellant's removal was ordered.

From the beginning, the Act of 1798 has been uniformly recognized as not subject to judicial review. Case of Fries, [fol. 53] C.C.D.Pa., 9 Fed. Cas. No. 5126; Brown vs. United States, 8 Cranch 110; Lockington vs. Smith, C.C.D.Pa., 15 Fed. Cas. No. 8448.[2] And as Mr. Justice Frankfurter said in Ludecke vs. Watkins, 335 U. S. 160 at 165 and 166:

"The power with which Congress vested the President had to be executed by him through others. He provided for the removal of such enemy aliens as were "deemed by the Attorney General" to be dangerous. But such a finding, at the President's behest, was likewise not to be subjected to the scrutiny of courts. For one thing, removal was contingent not upon a finding that in fact an alien was 'dangerous.' The President was careful to call for the removal of aliens 'deemed by the Attorney General to be dangerous.' But the short answer is that the Attorney General was the President's voice and conscience. A war power of the

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[2] See also United States ex rel. Kessler et al. vs. Watkins, 2 Cir., 163 F.2d 140; United States ex rel. Hack vs. Clark, 7 Cir., 139 F.2d 552; United States ex rel Schlueter vs. Watkins, 2 Cir., 158 F.2d 853; Citizens Protective League vs. Clark, U. S. App. D. C., 155 F.2d 290.

President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized."

Appellant next urges that his right to voluntary departure has been effectively nullified by the action of the United States in requesting foreign governments not to grant him a visa and in notifying the Alcoa Steamship Company of refusal by friendly governments of visas. He asks for opportunity to prove that visas were refused him because of those acts.

As above outlined, the Attorney General advised appellant that under the terms of the removal order affecting him "* * * you may proceed to any country of your choice, if arrangements can be made". Appellant offered to show below that he unsuccessfully attempted to secure a de- [fol. 54] parture visa to every or any known, what he calls, "friendly country outside of the United States." A letter from the State Department to Alcoa Steamship Company is an exhibit in the case. In that letter the Department notified the steamship company that certain German nationals, including appellant, had been determined to be dangerous to hemispheric or national security; that the United States "* * * is issuing orders directing these individuals to depart from the United States within thirty days and stating that if at the end of that period the alien will not have effected this departure, he will be removed to Germany." The letter suggested that great care be taken to make certain that visas presented by any of the aliens listed were currently valid. It concluded by stating, "This letter is not to be construed as a request that you deny to any individual transportation to a country which is actually willing to admit him."

It is not disputed that the appellant was notified to leave the United States and was given at least thirty days to accomplish that result. But, says appellant, the actions of the United States in fact prevented him from so doing. Appellant alleges this as the sole reason his departure was rendered impossible.

The government concedes that it sent out to friendly governments and to the particular steamship company, information that appellant was deemed a dangerous alien

enemy. That notification did not necessarily preclude acceptance of a person so listed by one or more of the countries circularized. And there is no contention by appellant that the United States similarly advised all countries throughout the world. Among other nations not so notified are Germany, Austria, India, Yugoslavia, Iraq, China, Russia, Czechoslovakia, Roumania, Hungary, Bulgaria and Albania. Appellant objects to going back to Germany where he was born. Nor does he wish to go to Russia or to any of its satellites. But he would seem to have a wide choice aside from those nations. For example, Austria, India and [fol. 55] Yugoslavia. There is no pretense of an endeavor to obtain a departure visa for any of those countries. It would seem that appellant was faced with no real dilemma. He just did not bother. His choice was not confined to Germany or Russia and those unfortunate lands dominated by the latter. Even if it had been, the statute does not provide that the alien subject to its mandate be cleared to whatever nation he might select. The Act merely allows that alien to leave this country voluntarily. As was said in United States ex rel. Dorfler et al. vs. Watkins, supra, at p. 432, "So long as there is any foreign country to which he could have gone, his failure to go there is a 'neglect' or 'refusal' to depart voluntarily. Hence a communication by the State Department to a foreign country, which that country may or may not heed, cannot be regarded as an unlawful restraint on the alien's voluntary departure. The relators have had ample time to arrange to leave the United States and have made no showing that it was impossible for them to do so."

As indicated in the above quoted language from the Dorfler decision, the action of the United States in warning its neighbors on this continent and its friends abroad regarding appellant cannot be fairly regarded as infringing on any obligation it may owe appellant. This nation has the right and duty to protect itself directly and indirectly against dangerous alien enemies. The Attorney General, functioning for the President, has deemed appellant to be in that category. He is being removed from the United States for that reason. Ordinary precaution requires that our allies and potential allies be warned in order that they may at least have the opportunity of passing upon the advisability of permitting the entrance and acceptance of such person into their territory. Our government cannot be

justly said to be thereby interfering with Jaegeler's choice of domicile. The situation was created by appellant himself and merely recognized by the Attorney General for what he deemed it to be. Thereafter under the powers properly delegated to him by the President he took steps [fol. 56] to prevent it from causing harm to the United States or its allies.

The opinion in United States ex rel. Von Heymann vs. Watkins, 2 Cir., 159 F. 2d 650, 653, is in nowise contrary to the views expressed. In that decision the court considered that the relator was being held in restraint on Ellis Island for the purpose of removal to Germany. The court found that under those circumstances it did "* * * not appear that this relator has ever refused, or except because of his internment, ever neglected, to depart." In the present appeal, Jaegeler had been served with the thirty day order and was in fact paroled during that time to give him the chance, if he desired, of departing voluntarily. United States ex rel. Hoehn vs. Shaughnessy, 2 Cir., 175 F. 2d 116, 117, cert. denied 338 U. S. 872, is also cited by appellant. There, with the same sort of notice to foreign governments involved, the alien did not try to leave this country of his own free will. The court said that, assuming such notice, "* * * it would not help the appellant in the absence of any indication that he tried to depart voluntarily and was, for that reason, unable to do so." As already pointed out, it is enough to say in this connection that there is a total absence of a bona fide attempt by Jaegeler, even on his own invalid theory, to enter any one of several countries open to him and not included in the ideological objections he makes.

Lastly, appellant argues that the removal order was in violation of international treaties and agreements to which the United States was and is a party. There is no merit in the point and no need for discussion of it.

The order of the District Court of October 9, 1950, dismissing the writ of habeas corpus, will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 57] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,373

UNITED STATES OF AMERICA ex rel. HUBERT JAEGELER, Appellant,

vs.

UGO CARUSI, Commissioner of Immigration and Naturalization, and KARL I. ZIMMERMAN, District Director Immigration and Naturalization Service

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Goodrich, McLaughlin and Hastie, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of October 9, 1950 of the said District Court in this case be, and the same is hereby affirmed.

Attest:

Ida O. Creskoff, Clerk.

April 2, 1951.

Endorsements: Judgment affirming Order of the District Court Received and Filed April 2, 1951. Ida O. Creskoff, Clerk.

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 29th, 1951.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 27th day of June, 1951.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 5, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

(8320)

IN THE

Supreme Court of the United States

October Term, 1951. No. [redacted]275

UNITED STATES OF AMERICA, EX REL.,
HUBERT JAEGELER,
Petitioner,

vs.

UGO CARUSI, Commissioner of Immigration and Naturalization, and CARL ZIMMERMAN, District Director for District No. 2, Philadelphia,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. CASE NO. 10-373 AND BRIEF IN SUPPORT THEREOF.

GEORGE C. DIX,
GORDON BUTTERWORTH,
1500 Walnut Street,
Philadelphia 2, Pa.,
Attorneys for Petitioner.

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TABLE OF CASES CITED

ACTS

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1951. No.

UNITED STATES OF AMERICA, EX REL.,
HUBERT JAEGELER,

Petitioner,

VS.

UGO CARUSI, Commissioner of Immigration and Naturalization and CARL ZIMMERMAN, District Director for District No. 2, Philadelphia,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your Petitioner, the United States of America, Ex Rel. Hubert Jaegeler, by his Attorneys, George C. Dix, Esq., and Gordon Butterworth, Esq., respectfully prays that a Writ of Certiorari issue to the United States Court of Ap-

peals for the Third Circuit to review a Judgment and Decree of that Court, dated April 2, 1951 affirming a Judgment of the United States District Court for the Eastern District of Pennsylvania, rendered October 9, 1950 in the above entitled action, dismissing a Writ of Habeas Corpus, and remanding Petitioner to the custody of Respondents.

The Order of the District Court was made by President Judge William H. Kirkpatrick and filed October 9, 1950. It appears on pages 45-6-A of the Record, and is not reported.

The Opinion of the Circuit Court of Appeals was written by Judge Gerald McLaughlin and was filed April 2, 1951 and appears at page 50 of the Record, and is recorded in 187 Fed. (2d) 912.

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED.

(a) *Statement of Matters Involved.*

I.

This case involves a deprivation of Petitioner's Right of Voluntary Departure under the Alien Enemy Act (50 U. S. C. A. 21 et seq.) and Presidential Proclamation 2655 (59 Statutes 370) and the Immigration Act of 1924, 8 U. S. C. A. Par. 155-c.

II.

This case also involves a deprivation of the rights of an alien enemy to procedural due process under the Fifth Amendment to the Constitution.

III.

The case further involves a violation of International Treaties and Agreements.

Summary.

Relator, a native of Germany, was a lawful quota immigrant to the United States in 1925, and has lived in Philadelphia with his wife a naturalized citizen since 1930. On December 8, 1941 at 1.30 A. M. (after Pearl Harbor) he was taken into custody by the F. B. I., without a Warrant, as an alien enemy, given a Hearing by an Enemy Hearing Board, and on February 1, 1942, was interned for the duration of the Emergency. In January, 1946 (and after hostilities had ended) a Repatriation Board recommended his removal as being determined "to be dangerous to the public peace and safety of the United States". On May 3, 1946, his removal was directed.

In May, 1946, the State Department suggested to friendly governments "that their Consulates be instructed not to grant visas to those persons listed" (in the communication) (including Relator) "deemed to be dangerous, pending their removal to Germany (Record 26a). It also notified the Steamship Company (Record 41a).

On April 2, 1947, Relator was notified by the Department of Justice that "you may go to any country of your choice, if arrangements can be made" (18a). He was ordered to depart by May 22, 1947. On May 15, 1947, he Petitioned for a writ of Habeas Corpus, which was sustained June 16, 1947 (Memo. Opinion).

After Hearing, a trial issue was directed to permit Relator to prove that he had been deprived of the right of voluntary departure (Opinion, Kirkpatrick, J., July 15, 1947) Record 23a).

On a third reargument, the District Judge reversed his three prior orders, and dismissed the Writ of Habeas Corpus, and remanded Relator to the Custody of Respondents (Record 45a). Relator was voluntarily set at liberty in July, 1947 without security.

JURISDICTION.

The Jurisdiction of this Court is invoked under the provisions of the Act of June 25, 1948, c. 646-691 as amended (28 U. S. C. A. Par. 1254 and Par. 2101) as and for a Review of a Decree of the United States Court of Appeals for the Third Circuit.

THE QUESTIONS PRESENTED.

I. Whether Petitioner's right of voluntary departure as directed by the State Department and Department of Justice has been so effectively nullified by actions of those Departments in requesting foreign governments not to grant visas to Relator, as to create an impossibility of performance, and deprive Relator of that right, and

II. Whether a lawful quota immigrant, tho an alien enemy, is entitled to the full benefit of procedural due process under the Fifth Amendment to the Constitution, and

III. Whether the removal Order was in violation of International Treaties and Agreements to which the United States was and is a party?

IV. The error of the Circuit Court.

FURTHER QUESTION.

V. Whether, if the House Bill (recently passed) to end the War with Germany and sign a Treaty of Peace becomes a law of this country, these questions become moot, and whether Petitioner is entitled to a discharge from custody?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

(A) In denying to Petitioner the right of voluntary departure, the Circuit Court of Appeals for the Third Circuit has decided a Federal question in a way that is in conflict with decisions of the Supreme Court of the United States and various Circuit Courts, and the Alien Enemy Act:

U. S. Ex rel. Von Heymann v. Watkins, 159 Fed. (2) 650;
U. S. Ex rel. Von Kleczkowski vs. Watkins, 71 Fed. Supp. 429;
U. S. Ex rel. Dorfner v. Watkins, 171 Fed. (2d) 431 Certiorari denied 5-31-49; 337 U. S. 914 (69 U. S. Rep. 1154);
U. S. Ex rel. Hoehn v. Shaughnessy, 175 Fed. (2d) 116;
The Alien Enemy Act, 50 U. S. C. A. Par. 21-2-3.

(B) In denying to Petitioner the right to prove factually that his voluntary departure had been effectively prevented

by the United States Government, the said Circuit Court has decided a Federal question adversely to the decision of the Supreme Court of the United States and various Circuit Courts, and has denied him the right to prove his case:

U. S. Ex rel. Dorfner vs. Watkins (supra);
U. S. Ex rel. Hoehn vs. Shaughnessy (supra).

II.

In denying to Petitioner, an enemy alien lawfully in the United States, the full benefits of Procedural due process under the Fifth Amendment to the Constitution, the said Circuit Court has rendered an opinion on a Federal question at variance with the decisions of the Supreme Court of the United States:

The Japanese Immigrant Case, 189 U. S. 86 (23-4 U. S. Rep. 611);
Wong Yang Sung vs. McGrath, 339 U. S. 33 (1950) (70 U. S. Rep. 445);
Knauf vs. Shaughnessy, 338 U. S. 309 (70 U. S. Rep. 309).

III.

In approving the removal of the Relator as an enemy alien, without the formality of a hearing, the preferring of charges, the production of witnesses or testimony, or an opportunity to disprove the charges, the Circuit Court violated the spirit and letter of the United Nations Charter and International Agreements.

Charter of United Nations June 26, 1945, Chapter IX, Art 55, "Observance of human rights and fundamental freedoms". (1945 Congressional Service, p. 964.) Ratified by the U. S. Senate July 28, 1945. Operative Oct. 24, 1945.

United States Participation Act (Public Law 264, 1945 Congressional Service, p. 598).

Presidential Address recommending approval (1945 Congressional Service 561).

IV.

That the Circuit Court of Appeals for the Third Circuit by its opinion filed April 2, 1951 (Record 50-) erred in affirming the decision of the District Court for the Eastern District of Pennsylvania dated October 9, 1950 (Record 45a) dismissing the Writ of Habeas Corpus and remanding Relator to the custody of Respondents.

V.

ADDITIONAL REASON.

If Congress shall have passed the Act now before it, terminating the War with Germany, and providing for a Treaty of Peace, will not the pertinent Acts and procedure become inoperative and Petitioner become entitled to a discharge from custody?

U. S. Ex rel. Ludecke vs. Watkins, 163 Fed. (2d) 143;

U. S. Ex rel. Wiczynski vs. Shaughnessy, 185 Fed. (2d) 349.

It is important that there should be uniformity of decisions among the Circuit Courts of Appeal, particularly on questions involving removal of persons lawfully in the United States, and their personal freedom and liberty, and it is in the public interest that these questions be decided by the Court of last resort.

For these reasons it is respectfully submitted that this Petition should be granted.

GEORGE C. DIX,
GORDON BUTTERWORTH,
Attorneys for Petitioner.

BRIEF.

I.

Whether Petitioner's right of voluntary departure as provided for by Statute and as directed by the State Department was so effectively nullified by actions of the Government as to create an impossibility of performance, and deprive him of that right

and

Was Petitioner entitled to prove the acts complained of, and show that they did prevent his voluntary departure.

(a) RIGHT TO VOLUNTARY DEPARTURE.

The Alien Enemy Act [1] guaranteed to Petitioner the right of voluntary departure, if and when he was ordered to depart from this country. This right was upheld by Mr. Justice Chase in the Von Heymann case [2] which opinion held:

> "His present restraint by the Respondent is unlawful in so far as it interferes with his voluntary departure, since the enforced removal, of which his present restraint is a concomitant, is unlawful before he does 'refuse or neglect' to depart.
>
> It does not appear that this Relator has ever refused, or, except because of his internment, ever neglected to depart."

Judge Rifkin, in the Von Kleczkowski case [3] held,

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[1] The Enemy Alien Act, 50 U. S. C. A. §21-2-3 (§4067—Rev. Statute).

[2] U. S. Ex rel Von Heymann v. Watkins, 159 Fed. (2d) 650.

[3] U. S. Ex rel Von Kleczkowski vs. Watkins, 71 Fed. Sup. at 429.

"Enemy Aliens ordered removed from the United States have the choice of voluntary departure."

and in the Hoehn case [4] Mr. Justice Chase declared:

"Even if we could accept the unsupported statement in the Brief as to Blacklisting, it would not help the Appellant in the absence of any indication that he tried to depart voluntarily, and was for that reason unable to do so."

(b) NOTICE TO DEPART.

Pursuant to the authority contained in the Alien Enemy Act the President, on July 14, 1945 issued his Proclamation #2655 (10 R. F. 8947) (U. S. Congressional Service, 1945, p. 1186) (Abstracted at p. 49a of Record) and directed the Attorney General to remove alien enemies—in accordance with such Regulations as he might prescribe; and

By Proclamation #2685 (11 F. R. 4079) (U. S. Congressional Service, 1946, p. 1721) the President fixed 30 days as a reasonable time within which to depart after receipt of such notice.

On April 2, 1947, the Department of Justice notified Relator

"* * * under the terms of your removal order you may proceed to any country of your choice, if arrangements can be made."

(See Record, p. 18a.)

This means any arrangements that Relator can make.

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[4] U. S. Hoehn vs. Shaughnessy, 175 Fed. (2d) 116.

(c) RELATOR LEARNS OF PREVENTIVE MEASURES.

It was then for the first time that he learned of the measures taken by Respondents to prevent his voluntary departure, and in truth to prevent him from departing to any country except Germany.

(d) WHAT WERE THE PREVENTIVE MEASURES.

Defendant has admitted that it sent a communication to certain foreign Governments, containing the celebrated Blacklist of 417 names including Relator's name, suggesting that their Governments instruct their Consuls not to grant visas to these persons [5] and the Memorandum sent to Foreign Governments,[6] and the note sent to Switzerland [7] and the Notice to the Steamship Company,[8] and in answer to Defendant's motion to dismiss the Writ of Habeas Corpus, Relator filed a Traverse alleging these facts (19a of Record).

(e) RELEASE FROM CUSTODY.

However, it was not until later that Relator was released from custody (Ellis Island) by the Respondent, and he *immediately made* whole hearted efforts to depart.

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[5] Affidavit of E. E. Hunt of State Dept. to Defendant's Motion to dismiss Habeas Corpus—Record 26-a.

[6] Memorandum of July, 1946—Record 31-a.

[7] Note to Switzerland—June, 1946—Record 34-a.

[8] Letter to Alcoa Steamship Co., July 1, 1946—Record 41-a.

(f) EFFORTS TO DEPART.

At the Argument before Judge Kirkpatrick in District Court on the motion to dismiss and the Traverse, Relator, thru Counsel, offered to prove that he had gone to all the Consular Offices listed in New York City and that none of them would grant him a visa, and excused themselves on the basis of the communications from Defendants, some of them even showing him the very communications and Blacklist.

The following is the list of Consular Offices listed in the Telephone Books of New York in July, 1947 and which we must assume is all of the then available offices; as well as those later listed. We classify the efforts made at each of them at that time in the light of the Opinion of the Circuit Court of Appeals:

1. Albania. No Office—behind the Iron Curtain.

2. Afghanistan. No Office in July, 1947.

3. Argentine. He applied and was refused.

4. Australia. He applied and was refused.

5. Austria. No office in July, 1947.

6. Belgium. He applied and was refused.

7. Bolivia. He applied and was refused.

8. Brazil. He applied and was refused.

9. Burma. No office in July 1947. Free 1-8-48.

10. Canada. He applied and was refused.

11. Chile. He applied and was refused.

12. China. No office in July 1947. Part was in control of Russia and part in U. S.

13. Columbia. He applied and was refused.

14. Costa Rica. He applied and was refused.

15. Cuba. He applied and was refused.

16. Czeckoslavia. No office—(Behind Iron Curtain).

17. Denmark. He applied and was refused.

18. Dominican Republic. He applied and was refused.

19. Ecuador. He applied and was refused.

20. Egypt. He applied and was refused.

21. El Salvador. He applied and was refused.

22. Estonia. No office (Behind Iron Curtain).

23. Ethiopia. No office (Controlled by Enemy—Italy).

24. Finland. He applied and was refused.

25. France. He applied and was refused.

26. Great Britain. He applied and was refused.

27. Greece. He applied and was refused.

28. Guatamala. He applied and was refused.

29. Germany. Enemy Country

30. Haiti. He applied and was refused.

31 Honduras. He applied and was refused.

32. Hungary. No office (under Control of Russia).

33. Iceland. No office (under Control of Denmark, who refused).

34. India. No office (under control of British Crown, who had refused).

35. Iran. Office was closed.

36. Irac. No office in July 1947.

37. Ireland. No office in July 1947.

38. Israel. No office in July 1947 (British Mandate till 5-14-49).

39. Italy. Enemy country.

40. Lebanon. No Office (British controlled).

41. Liberia. Negro Republic.

42. Lithuania No Office (Behind Iron Curtain).

43. Luxenbourg. No Office (Control of Allied Military).

44. Mexico. He applied and was refused

45. Monaco. Required $5,000 cash for entry. (Relator was imprisoned for 4 years, and without funds.)

46. Netherlands. He applied and was refused.

47. New Zealand. He applied and was refused.

48. Nicaraugua. He applied and was refused.

49. Norway. He applied and was refused.

50. Pakistan. No office (Member of British Comm. of Nations).

51. Panama. He applied and was refused.

52. Paraguay. He applied and was refused.

53. Peru. He applied and was refused.

54. Russia. Behind the Iron Curtain.

55. Poland. No office (Behind Iron Curtain).

56. Roumania. No office (Behind Iron Curtain).

57. Portugal. He applied and was refused.

58. Spain. He applied and was refused.

59. Sweden. He applied and was refused.

60. Switzerland. He applied and was refused.

61 Syria. No office (French Mandate).

62. Turkey. He applied and was refused.

63. Union of S. Africa. He applied and was refused.

64. Uraguay. He applied and was refused.

65. Venezuela. He applied and was refused.

66. Yugoslavia. No office (Behind Iron Curtain).

67. Bulgaria. No office (Behind Iron Curtain).

We must bear in mind that Relator had been in custody since December 9, 1941, and had no income and was without funds. Part of the time his wife spent with him, voluntarily, in custody, and part of the time she worked to support herself.

(g) WERE HIS EFFORTS TO DEPART HONEST.

Judge McLaughlin, in his opinion, (Record 50a) said that there were nations that were not notified, and named Germany (29) and Austria (5) (but they were enemy countries) and Yugoslavia (66), Russia (54), Czechoslovia (16), Roumania (56), Hungary (32), Bulgaria (67) and Albania (1) (but they were all behind the iron curtain) China (12) (which had no representative Government to whom to apply) India (34) (which was part of the British Commonwealth of Nations, and governed from London) and Irac (36). In addition, Germany (29), Austria (5), Yugoslavia (66), Czechoslavia (16), Roumania (56), Hungary (32), Bulgaria (67), Albania (1), China (12), India (34), and Irac (36) did not have any Consular Offices to which Relator could apply for a visa. The Judge said there was a wide choice of places, citing Austria (5), India (34) and Yugoslavia (66), but that was not so, as we have just shown. The Judge then went on to say:

> "It would seem that Appellant was faced with no real dilemma. He just did not bother."

Under the decisions cited, Relator was entitled to show any real effort to voluntarily depart, and why he did not succeed. The Court refused Relator the opportunity to show that it was impossible to go. The Dorfner case [9] was cited as the authority for the opinions of both the District and Circuit Courts, altho the Hoehn case (supra) later explained that case. The Courts both said that if there was any place to which he could go (except his native country), he must go there. However, if the Defendant stops Relator from going to those places, then it cannot be adjudged that he could go there.

II.

An enemy alien has been denied the benefits of Procedural Process, under the Fifth Amendment.

Mr. Justice Chase in the Von Heymann case (supra) said that the power to remove was vested in the President, in certain cases, to maintain the Security of the country. The Presidential Proclamation was made July 14, 1945. Relator was in custody from 1941 until 1947, when the Defendant decided to remove him. The War was over. The Government was seeking a rapproachment with Germany. Relator has been free since 1947. The Court in that case went on to say:

> "But tho the Statute under which appellee is restraining Relator, pursuant to executive orders, is applicable, it does not follow that the present restraint is lawful."

We quote the Japanese Immigrant case [10]

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[9] U. S. Ex rel Dorfner vs. Watkins, 171 Fed. (2) 431.

[10] The Japanese Immigrant Case, 189 U. S. 86 (23-4 U. S. Rep. 309).

> "This Court has never held, nor must we now be understood as holding, that Administrative Officers, when executing the provisions of a Statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. Therefore it is not competent for—an executive officer,—arbitrarily to cause an alien—even tho illegally here—to be taken into custody and *deported without giving him* all opportunity to be heard,—no such arbitrary power can exist where the principles involved in due process of law are recognized."

An alien within the United States, particularly if lawfully here, unlike one applying at the border, is entitled to the full benefits of procedural due process under the Fifth Amendment.[11]

This must mean that in a removal proceeding grounded in National Security, as in all other deportation proceedings, expulsion may be ordered only in accordance with law, after a fair hearing at which the alien is fully apprised of the evidence against him and given an opportunity to be represented by Counsel, to refute the charges and to present countervailing evidence[12] and the decision must be based on the evidence in the Record.[13]

This is a removal case, but an analogy is a deportation case in which limited judicial review can be invoked by Habeas Corpus, and the inquiry then is whether a fair hearing in conformity with law was had on the basis of substantial evidence.[13] That is our instant case. As in the Von Kleczkowski case (supra) Relator sought to prove not that the decision was wrong, but that

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[11] Wong Yang Sung v. McGrath, 339 U. S. 33 (1950) (70 U. S. Rep. 445).

[12] Whitfield vs. Hanges, 222 Fed. 745.

[13] Vajtauer, v. Commissioner, 273 U. S. 103 (47 U. S. Rep. 303); Bridges vs. Wixon, 326 U. S. 135 (65 U. S. Rep. 1443).

evidence was improperly received, that he was never acquainted with the charges, nor faced with his accusers, that the evidence was never known, and but for that unproduced evidence, it is wholly speculative, yes, in this case definitely determined that no adverse finding could have been made as Mr. Justice Jackson said in his dissent in the Knauf case:[14]

> "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized any administrative officer to break up the family of an American citizen * * *"
>
> "I cannot agree that it (Congress) authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it."
>
> "I should direct the Attorney General either to produce his evidence justifying exclusion, or to admit Mrs. Knauf to the country."

III.

Was the removal "Order" in violation of the spirit and letter of international agreements?

At the outbreak of activities, on December 8, 1941, an emergency arose which required that our Government take every precaution to protect itself and our country. That was common sense, and as citizens we are thankful that it was done. Along with thousands of other persons, Relator was detained in custody "for the duration of the emergency". To all intents and purposes, the emergency ended in 1945. Congress has not yet completed action on a Treaty

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[14] Knauf v. Shaughnessy, 338 U. S. 537 (70 U. S. Rep. 309); Klaprott v. United States, 335 U. S. 601; 336 U. S. 942 (69 U. S. Rep. 384).

with Germany, but the House passed a Bill to that effect two weeks ago, at the President's request, and sent it to the Senate.

Relator was released, on parole, in July 1947, and has been at unrestrained liberty from then to the present time. If there was any justification for his detention in 1941, it certainly has long since ceased to exist. We can only surmise that the cause has ceased to exist, but we do not yet at this late date know what the cause for the arrest was. We were never told.

It is to the pressing of the action for Relator's removal in the year of Grace 1951, that we now address ourselves. In the Preamble to our own Constitution, we declared "all men are endowed by their Creator with certain inalienable rights—among these—life, liberty and the pursuit of happiness"; but of what use are they to Relator, if he can not enjoy them. Remember, he was and is lawfully within this country and therefor entitled to the enjoyment and protection of those rights.

Methinks it was for the preservation of human rights that we fought our wars, including, with much protestation, the last two in Europe. In order to safeguard the rights of individual people, we then caused to be formed the United Nations and the United Nations Charter. It was prepared here, signed here, fought for here as well as in Korea. It is the Law of this Country for it was ratified by Congress on July 28, 1945; Article 55 was addressed to the observance of human rights and the preservation of human freedoms. In recommending the adoption of the Participation Act of 1945, the President said: "our first need is to take part in the several agencies" of that organization.

Our Country then took part in a number of conferences with other nations, resulting in the Adoption of the Emergency Advisory Council for Political Defence (Title 50 U. S. C. A. Par. 220), and the Act of Chapultpec. They were formed, held and adopted at our insistence, and on April 12, 1946 the Emergency Advisory Counsel adopted Resolu-

tion XXVI, which recommended a uniform standard for all proceedings relative to removal, and proposed certain criteria as to what constituted "dangerous persons". Paragraph 3 a-b set forth some considerations to be considered in determining the advisability of removing such persons. These were later incorporated into the Inter-American Treaty of Reciprocal Assistance of September 2, 1947.

Relator has been the husband of an American citizen since 1930, and has lived with her and supported her during all of that time, except during part of his incarceration.

We must assume that our Government intended to be bound by the United Nations Charter and the other International Agreements, because we claim to be fighting to preserve the sanctity of International Agreements. They may not be Treaties; but Presidential Proclamations, and private decisions of the Attorney General's Office are not, either.

While Resolution XXVI was specifically addressed to the control and detention of persons who actively supported the war efforts of the enemies, it was also intended to cover that much larger group who were considered dangerous or possibly dangerous. It recited that almost all countries limited the measures taken to detention—either for humanitarian or security reasons, and that many were set free before the end of 1945. It recited that Resolution XX only recommended detention for the duration of the War; and that any one really dangerous should not be released, even to his own country. It defined as follows:

Part II, (A) Criteria for determining whether a person is dangerous, (1) dangerous persons—those who have engaged in

(a) "* * * *espionage, sabotage* or other *subversive Acts* to the detriment * * *"

"It shall not be necessary to have a penal conviction * * * but to have proof of such facts.

(b) *Military participation.*

(c) *Participation in propaganda or commercial operations.*

Different treatment was provided for different degrees of dangerousness.

By Paragrah A-2 of the Resolution itself (p. 20) dangerous persons were classified as above set forth, and by Paragraph A-3 it was determined that even if such person was deemed dangerous, it should not apply to a person who could show

> (C) that his spouse * * * is a national of an American Republic and that the conjugal ties have been established and are maintained in good faith.
>
> (Attached to and forming part of Defendant's Motion to Dismiss the Petition for Habeas Corpus. Excerpts therefrom (Record 25a)).

IV.

Error.

For the reasons already advanced, the Circuit Court of Appeals, by its Opinion of April 2, 1951, erred.

V.

Further Question.

The House of Representatives, in August 1951, and at the request of the President, passed a Bill terminating the War with Germany. It was sent to the Senate. It may become law before this Petition can be acted upon, or before the case (if Certiorari is granted) can be argued. In that case Relator will no longer be an enemy alien, and the

procedure will no longer apply. Chief Justice Learned Hand held:[15]

> "We must dispose of Orders entered in Habeas Corpus proceedings according to the law as it exists at the time when we decide the appeal, and not at the time when the Order itself was entered."

It is therefore respectfully submitted that

(a) Relator was deprived of his right of voluntary departure and is entitled to a fact issue to establish that fact; and that

(b) Relator was deprived of the right to procedural due process under the Fifth Amendment, and

(c) That the removal Order was in violation of International Treaties and Agreements;

(d) That the United States Court of Appeals for the Third Circuit erred in affirming the Order of the District Court, in dismissing the Writ of Habeas Corpus and remanding Relator to the custody of Respondents;

(e) That if the War with Germany is terminated, then Relator should be released;

and that a Writ of Certiorari should issue in the above entitled case.

Respectfully submitted,

GEORGE C. DIX,
GORDON BUTTERWORTH,
Attorneys for Petitioner.

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[15] U. S. Ex rel. Wiczynski vs. Shaughnessy, 185 Fed. (2) 349.
U. S. Ex rel. Pizzuto vs. Shaughnessy, 184 Fed. (2) 666.
U. S. Ex rel. Ludecke vs. Watkins, 163 Fed. (2) 143.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951 No. 275

UNITED STATES OF AMERICA, ex rel

HUBERT JAEGELER,
Petitioner,

v.

UGO CARUSI, Commissioner of Immigration and Naturalization, and CARL ZIMMERMAN, District Director for District No. 1, Philadelphia,
Respondents

MEMORANDUM
and
SUPPLEMENT TO BRIEF OF PETITIONERS
sur
PETITION FOR CERTIORARI

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951. NO. 275.

United States of America, ex rel.
Hubert Jaegeler,
Petitioner,

v.

Ugo Carusi, Commissioner of Immigration and Naturalization, and Carl Zimmerman, District Director for District No. 1, Philadelphia,
Respondents.

MEMORANDUM
of
RESOLUTION OF CONGRESS TERMINATING WAR WITH GERMANY
and
CHANGING STATUS OF RELATOR

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your Petitioner, the United States of America *ex rel* Hubert Jaegeler, by his Attorneys, George C. Dix and Gordon Butterworth respectfully suggest that the Con-

gress of the United States of America by Resolution, on October 18, 1951, signed by the President on October 19, 1951, terminated the war with Germany.

That your Petitioner was a native born German, and a lawful quota immigrant in the United States on December 9, 1941, when he was taken into custody by the F.B.I., acting on behalf of the Department of Justice, pursuant to the provisions of the Alien Enemy Act and the Presidential Proclamation, charging him with being an alien enemy.

That Relator was incarcerated from December 9, 1941 until May, 1947, when he was set at liberty by Order of the Department of Justice, pending a disposition of this case.

That a Petition for Certiorari is before your Honorable Court to determine whether he was deprived of his right of voluntary departure.

That pending a decision on such petition and answer, the Congress of the United States on October 18, 1951, passed a Resolution terminating the state of war with Germany. The President signed the Resolution of October 19, 1951, terminating the war as of that date.

That by reason of such resolution, the status of Relator was changed from that of an alien enemy back again to that of a lawful quota immigrant in the United States.

Wherefore Relator suggests that the said Resolution terminated the power and authority of the Department of Justice and the Attorney General, acting by authority of the said Proclamation, to order the removal of Relator from this country;

that the question of the deprivation of Relator's right to voluntary removal is moot,

and he therefore suggests that the decrees of the Lower Courts be vacated, and the Relator be released.

SHORT STATEMENT OF ADDITIONAL MATTERS INVOLVED.

I.

This case involves the deprivation of Petitioner's right of voluntary departure under the Alien enemy Act, and Presidential Proclamation.

(stated and argued in Original Brief)

II.

and Whether the Resolution of Congress passed October 18, 1951, signed by the President October 19, 1951, terminated the authority and power of the Department of Justice and the Attorney General to remove Relator from the country.

SUPPLEMENTARY SUMMARY.

The question before this Honorable Court on the Original Brief is whether the Department of Justice has authority to remove Relator from this country, by depriving him of his right of voluntary departure.

Relator was at the time of the removal order an alien enemy, he being a native born German, a lawful quota immigrant in this United States.

Subsequent to the removal order and in fact since the filing of the Petition for Certiorari and the answer thereto by the Respondents, and before any decision has been handed down in this matter, the Government of the United States by resolution of Congress on October 18, 1951, signed by the President on October 19, 1951, terminated the war with Germany, thereby changing the status of Relator from that of an alien enemy back again to that of a lawful quota immigrant.

ADDITIONAL QUESTION PRESENTED.

Whether the Resolution of Congress of October 18, 1951, signed by the President of October 19, 1951, revoked the status of Relator as an alien enemy, and terminated the authority of the Department of Justice and the Attorney General under the Enemy Alien Act and the Presidential Proclamation to remove Relator from this country as an alien enemy.

ADDITIONAL REASONS RELIED ON FOR RELIEF.

THAT SINCE THE FILING OF THE Petition for Certiorari and the answer thereto, the Congress of the United States has terminated the war with Germany.

U. S. *ex rel* Kessler *v.* Watkins, 163 Fed. 2, 140;
U. S. *ex rel* Ludecke *v.* Watkins, 163 Fed. 2, 143.

ARGUMENT.

The several additional issues raised by this Memorandum as a supplement to Petitioner's Brief are matters of substantive law and not mere technicalities.

I.

Did the termination of War also terminate the authority of the Attorney General to remove Relator?

The Statute under which the Attorney General acted in ordering the removal of Relator[1] was and is predicated on a present state of War between the two countries, and establishes a status for the citizens of those countries calling them "enemy aliens". Obviously that status exists

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[1] R.S. Par. 4067: April 16, 1918. Ch. 55; 40 Statutes 531, Page 47a of Record.

only so long as the State of War exists. When it ends, so also ends the status of "enemy aliens." That person then becomes what he was before war existed, in this case a lawful quota immigrant.

The Act itself in its very words says "whenever there is a declared war * * * all natives of the hostile nation—shall be removed as alien enemies". So, if there is not a state of war, Relator would not be removed. If a state of war is terminated, and no longer exists, there is no reason or excuse for his removal.

The Presidential Proclamation (Record 49a) provides that "all alien enemies * * * who shall be deemed dangerous * * * shall be subject to removal".

This is not a case where Relator is charged with any *offence. As a matter of fact, he never was told of what he was even suspected.* He was ordered removed, like many others, because he was "deemed to be dangerous to the public peace and safety of the United States * * *". That was in January 1946.

The fact that immediately after he was notified that he was deemed to be dangerous, he was given 30 days to depart, and then he was released, and set free, without any custody or control, and he has been free from that time down to the very present, is conclusive proof that he was not and is not dangerous.

Certainly if the Department of Justice had believed that he was even slightly dangerous, they would never have released him. They would have kept him on Ellis Island. This is not presented as a legal argument, but as evidence of the fact that the whole thing was only a precautionary matter during the Emergency. The Emergency has long since ended. He should be free.

The Senate on October 18, 1951, passed a Resolution (H. J. Res. 289) (Calendar No. 844) (Report No. 892) which had been previously passed by the House, terminating the War with Germany. It was signed by the

President on October 19, 1951, thereby becoming the "Law of the Land", by the very terms thereof; *i. e.*:

> "The State of War declared to exist between the United States and the Government of Germany * * * is hereby terminated, and such termination shall take effect on the date of enactment of this Resolution".[1a]

Hostilities were declared to have ceased in December of 1947. The War itself is now formaliy declared to have terminated.

It will be noted that while special mention was made in the Resolution as to alien property, no exception was made as to the removal of alien enemies.

The opinions of the Courts have been unanimous in holding that the mere cessation of hostilities is not sufficient to cause a release of the alien enemy from the purview of the Statute.[2] It is necessary that the War be officially terminated, and it was terminated so that we would be friendly with the German people. We must *not* show our friendliness by removing them as alien enemies.

Mr. Justice Hand[3] said: "The alien enemy Act remains effective with respect to interned German alien enemies so long as a state of 'War' exists with the German Nation," and the Courts refused to release any of these men until the War should be formally terminated.

Conversely, when no state of war exists, the Act is not effective. If the Act is not effective, Relator is no longer subject to its provisions.

The plain intention of the Act and of the Proclamation, and of the proceedings of the Department pursuant to them was to protect the country from danger during the emergency. That time—that emergency has passed.

[1a] Resolution, page 8.
[2] U. S. *ex rel.* Kessler *v.* Watkins, 163 Fed. 2, 140.
[3] U. S. *ex rel.* Ludecke *v.* Watkins, 163 Fed. 2, 143.

II.

Habeas Corpus Proceedings must be disposed of as of time of appeal.

The present issue should be determined in the light of the law, and its application to facts, as it is at the time of this Argument, and not as it was when the original order was made.[4]

In this very case Judge Kilpatrick on three separate occasions decided in favor of Relator, and it was only at the last rehearing and the submission of a then new authority by Respondent that he reversed his prior decisions. Obviously, he was interpreting the Law as he understood it to be at the time of each decision.

We ask the same consistency now.

The Relator is no longer an alien enemy, he is no longer subject to the provisions of the Act or Proclamation. We quote:

> "We have just held that we must dispose of orders in Habeas Corpus Proceedings according to the law as it exists at the time we decide the appeal, not at the time when the order was made."[5]

It is respectively submitted that in the light of the action of Congress, and the authorities cited,

that the Resolution of Congress, signed by the President, terminated the power and authority of the Department of Justice and the Attorney General to order the removal of Relator from the country;

that the question of the deprivation of Relator's right to voluntary removal as therefore moot;

and that the Decrees of the Lower Courts should be vacated, and Relator released.

Respectfully submitted,

GEORGE C. DIX,
GORDON BUTTERWORTH,
Attorneys for Petitioner.

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[4] U. S. *ex rel.* Pizzuto *v.* Shaughnessy, 184 Fed. 2, 666.
[5] U. S. *ex rel.* Wieynski *v.* Shaughnessy, 185 Fed. 2, 347.

Calendar No. 844

82D CONGRESS
1ST SESSION

H. J. RES. 289

[Report No. 892]

IN THE SENATE OF THE UNITED STATES

JULY 30 (legislative day, JULY 24), 1951

Read twice and referred to the Committee on Foreign Relations

OCTOBER 8 (legislative day, OCTOBER 1), 1951

Reported by Mr. CONNALLY, with an amendment

[Insert the part printed in italic]

JOINT RESOLUTION

To terminate the state of war between the United States and the Government of Germany.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1947 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue

to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.

Any citizen (or his successors in interest) whose property was acquired by vesting or otherwise by the Alien Property Custodian and who thereafter instituted suit to recover such property in the manner provided in section 9 (a) of the Trading With the Enemy Act, and subsequent to the institution of such suit, and during the existence of the state of war with Germany hereby terminated, entered into an agreement with officers or agents of the United States, purporting to compromise or release his claim without a full hearing on the merits by a court of competent jurisdiction to determine whether such property was validly vested under the Trading With the Enemy Act, may, within one year of the effective date of this resolution, institute suit to recover such property in the manner provided in section 9 (a) of such Act; and no agreement, compromise, or release executed by such citizen during the state of war and purporting to convey such property to the Alien Property Custodian or to release any claim by the citizen to such property and no judgment entered on any such agreement, compromise, or release shall be pleaded in bar of such suit; it being the intent of this section to afford every such citizen whose property was so acquired by the Alien Property Custodian an opportunity for full hearing on the merits of his claim to such property. A claimant hereunder shall not be required, as a condition precedent of instituting such suit, to tender back any benefit or consideration received by him in connection with any release, compromise, or agreement executed by him, but the court shall, in its final

judgment, make such order with respect to any such benefit or consideration as it shall deem equitable in the circumstances.

Passed the House of Representatives July 27, 1951.

Attest: RALPH R. ROBERTS,
Clerk.[6]

[7]

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[6] Note. This is the form in which the Resolution was presented to the Senate on Oct. 8, 1951, and the same form in which it was passed, and is the latest available printed form at this time. This may be verified from the Congressional Record of Oct. 18, 1951, no printed copy of which is yet available.

[7] The Joint Resolution was signed by the President on Oct. 19, 1951, and no printed copy of that is yet available.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951 No. 275

UNITED STATES OF AMERICA, EX REL.,
HUBERT JAEGELER,
Petitioner,

v.

UGO CARUSI, Commissioner of Immigration and Naturalization, and CARL ZIMMERMAN, District Director for District No. 2, Philadelphia,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The Opinions in the District Court, *i.e.*, Judge Kirkpatrick, July 15, 1947; September 30, 1948, and October 9, 1950 appear respectively at pages 18, 33 and 35 of the Record.

The Opinion of the Court of Appeals for the Third Circuit, *i.e.*, Judge McLaughlin filed April 2, 1951, appears at page 37 of the Record.

JURISDICTION.

The Judgment of the Court of Appeals for the Third Circuit was filed April 2, 1951. On June 27, 1951, an order extending the time for filing a Petition for Certiorari to August 29, 1951 was issued by Mr. Justice Black (R-44). Petition for Certiorari was filed August 24, 1951. Certiorari was allowed November 5, 1951 (R-45).

Jurisdiction of the Court is invoked under 28 USC 1254 (1) and 2101.

QUESTIONS PRESENTED.

I.

Whether Petitioner's right of voluntary departure, as provided for by Statute, and directed by the Department of Justice, has been so effectively nullified by actions of the Government in requesting all foreign governments not to grant visas to Relator, as to create an impossibility of performance by Relator, and thus deprive him of the right,

and

Was Petitioner entitled to prove the acts complained of, and show that they did prevent his voluntary departure, and

Ia.

The effect of a denial of certiorari upon the determination of other cases, and particularly the effect of the denial of certiorari in the case of U. S. *ex rel* Dorfler *v.* Watkins, 171 Fed. 2nd 431, (certiorari denied 337 U. S. 914) upon the present issue, and

II.

Whether a lawful quota immigrant, though a native of an enemy country, is entitled to the full benefits of Procedural due process under the Fifth Amendment, and

III.

Whether the removal order was in violation of International Treaties and agreements, and

IV.

Whether the Joint Resolution of Congress (Public Law 181,—82 Congress; chapter 519,—1st Session; H. J. Res. 289) approved October 19, 1951, terminating the State of War between the United States and the Government of Germany also terminated the authority and Power of the President and the Department of Justice to remove Relator from this country pursuant to authority of the Alien Enemy Act of 1798, R. S. 4067, as amended; and

V.

The error of the Lower Court.

STATUTES AND REGULATIONS INVOLVED.

(1) The Alien Enemy Act of 1798, R. S. 4067, as amended, 40 Statutes 531: 50 U. S. C. 21, *et seq.*

(2) Presidential Proclamation 2655, 10 Fed. Reg. 8947.

(3) Regulations of the Attorney General, 10 Fed. Reg. 12189.

(4) Charter of the United Nations (1949 Congressional Service 964).

(5) Presidential address (1945 Congressional Service 561).

(6) U. S. Participation Act (1945 Congressional Service 598).

(7) Joint Resolution of Congress (Public Law 181; 82nd Congress, chapter 519; 1st Session. H. J. Res. 289) terminating war with Germany.

(8) Statute of July 30, 1947 c. 388, section 1. 61 Statute 633.

STATEMENT OF THE CASE.

a. PETITIONER.

Relator, a native of Germany, was a lawful quota immigrant to the United States in 1925, and has lived in Phila-

delphia with his wife, a naturalized citizen, since 1930. He was employed in business, and so far as appears, his record is clear except as effected by these proceedings. He voluntarily surrendered to the F. B. I. on December 9, 1941 at 1:30 A. M. (after Pearl Harbor).

He was released by the Government in July 1947, and has been at full liberty since then, reporting to the Immigration Department as requested. He returned to his wife, and has lived with her in Philadelphia since then. He has been steadily employed in business. He is presently free. (R-3.)

b. Factual History.

On December 9, 1941, at 1.30 A. M. (after Pearl Harbor) he was taken into custody by the F. B. I. (voluntarily—and without a warrant) as an enemy alien; was given a hearing by an Enemy Hearing Board, and on February 1, 1942 was interned for the duration of the Emergency. A Repatriation Board recommended his removal as being determined "to be dangerous to the public peace and safety of the United States," although hostilities had ceased. He was ordered removed on May 3, 1946. He was released in July 1947. Apparently he was no longer deemed dangerous, if he ever was. (R-4-6.)

c. Court Proceedings.

On May 15, 1947, a Petition for writ of *Habeas Corpus* was filed, which after hearing was allowed. After a further hearing, a trial issue was directed, to permit Relator to prove that he has been deprived of the right of voluntary departure; see opinion Judge Kirkpatrick, July 15, 1947 (R-18). On a second reargument, the District Judge reversed his prior decisions, dismissed the writ of *Habeas Corpus* and remanded Relator to the Custody of Respondents, see Opinion October 9, 1950, Judge Kirkpatrick (R-35). His decision was based on the refusal of your Honorable Court on May 31, 1949 to allow a certiorari in the case of U. S. *ex rel* Dorfler *v.* Watkins, 171 Fed. 2nd 431 (certiorari denied. 337 U. S. 914).

On appeal to the Court of Appeals for the Third Circuit, the Lower Court was affirmed; see Opinion by McLaughlin, Circuit Judge, filed April 2, 1951 (R-37).

On Petition filed, a certiorari was allowed November 5, 1951 (R-45).

ARGUMENT.

I.

Whether Petitioner's right of voluntary departure as provided for by Statute and as directed by the State Department was so effectively nullified by actions of the Government as to create an impossibility of performance, and daprive him of that right

and

Was Petitioner entitled to prove the acts complained of, and show that they did prevent his voluntary departure.

(a) RIGHT TO VOLUNTARY DEPARTURE.

The Alien Enemy Act[1] guaranteed to Petitioner the right of voluntary departure, if and when he was ordered to depart from this country. This right was upheld by Mr. Justice Chase in the Von Heymann case[2] which opinion held:

> "His present restraint by the Respondent is unlawful in so far as it interferes with his voluntary departure, since the enforced removal, of which his present restraint is a concomitant, is unlawful before he does 'refuse or neglect' to depart.
>
> It does not appear that this Relator has ever refused, or, except because of his internment, ever neglected to depart."

Judge Rifkin, in the Von Kleczkowski case[3] held,

---

[1] The Alien Enemy Act, 50 U. S. C. A. §21-2-3 (§4067—Rev. Stat.).

[2] U. S. *ex rel* Von Heymann *v.* Watkins, 159 Fed. (2d) 650.

[3] U. S. *ex rel* Von Kleczkowski *v.* Watkins, 71 Fed. Sup. at 429.

"Enemy Aliens ordered removed from the United States have the choice of voluntary departure."

and in the Hoehn case[4] Mr. Justice Chase declared:

"Even if we could accept the unsupported statement in the Brief as to Blacklisting, it would not help the Appellant *in the absence of any indication that he tried to depart voluntarily, and was for that reason unable to do so.*"

"The privilege of voluntary departure does not imply that the alien must be able to go to any country of his choice. So long as there is any foreign country to which he could have gone, his failure to go there is a neglect or refusal to depart voluntarily."[5]

However, "Any foreign country to which he could have gone" presumes a place of livable habitation, not the North Pole, an uninhabitated south sea isle, a pest ridden jungle, another country where he would be an enemy and be imprisoned, as in a Siberian Mine. It must be at least a livable place, for remember we are arbitrarily depriving this man of his home and living (built up and enjoyed for 26 years); and as a civilized country we owe him some obligation, especially as he is not accused of any offence, but is one of a group of people lawfully here, and whom we are sequestering for our supposed self protection.

(b) NOTICE TO DEPART.

Pursuant to the authority contained in the Alien Enemy Act the President, on July 14, 1945 issued his Proclamation No. 2655 (10 R. F. 8947) (Abstracted at p. 49a of Record) and directed the Attorney General to remove alien enemies—in accordance with such Regulations as he might prescribe; and

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[4] U. S. *ex rel* Hoehn *v.* Shaughnessy, 175 Fed. (2d) 116 (certiorari denied 338 U. S. 872).

[5] U. S. *ex rel* Dorfler *v.* Watkins, 171 Fed. (2d) 431 (certiorari denied 337 U. S. 914).

By Proclamation No. 2685 (11 F. R 4079) the President fixed 30 days as a reasonable time within which to depart after receipt of such notice.

On April 2, 1947, the Department of Justice notified Relator

> "* * * under the terms of your removal order, you may proceed to any country of your choice, if arrangements can be made. No exit permit is required to leave this country, and you are (and have been) free to depart at any time under such order." (R-14.)

This means any arrangements that Relator can make. It implies that the Government will not interfere with his efforts.

(c) RELATOR LEARNS OF PREVENTIVE MEASURES.

It was then, July, 1947, for the first time that he learned of the measures taken by Respondents to prevent his voluntary departure, and in truth to prevent him from departing to any country except Germany.

(d) WHAT WERE THE PREVENTIVE MEASURES.

Defendant has admitted that it sent

a communication to certain foreign Governments, containing the celebrated Blacklist of 417 names including Relator's name, "suggesting" that such Governments instruct their Consuls not to grant visas to these persons[6]

the Memorandum sent to Foreign Governments[7]

the note sent to Switzerland[8]

the Notice to the Steamship Company[9]

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[6] Affidavit of E. E. Hunt of State Dept. to Defendant's Motion to dismiss *Habeas Corpus*—Record 20.

[7] Memorandum of May, 1946—Record 24.

[8] Note to Switzerland—June, 1946—Record 26.

[9] Letter to Alcoa Steamship Co., July 1, 1946—Record 32.

In answer to Defendant's motion to dismiss the Writ of *Habeas Corpus*, Relator filed a Traverse alleging these facts, and offering to prove his applications for visas were refused because of such actions (R-15).

(e) RELEASE FROM CUSTODY.

However, it was not until later, July, 1947, that Relator was released from custody (Ellis Island) by the Respondent, and he *immediately made* whole hearted efforts to depart.

(f) EFFORTS TO DEPART.

At the Argument before Judge Kirkpatrick in District Court in July 1947 on the Motion to dismiss and the Traverse, Relator, through Counsel, offered to prove that he had gone to all the Consular Offices listed in New York City and that none of them would grant him a visa, and excused themselves and their governments on the basis of the communications from Defendants, some of them even showing him the very communications and Blacklists.

The following is the list of Consular Offices listed in the Telephone Books of New York City in July, 1947 and which we must assume is all of the then available offices. We also included those later listed. After the filing of the Traverse (May 23, 1947) and before argument before the District Court (July 15, 1947), Relator made second and formal applications to all the listed consuls, and the Court was so informed.

We classify the efforts made at each of them at that time in the light of the Opinion of the Circuit Court of Appeals:

1. Albania. No office (*Behind the Iron Curtain*).
2. Afghanistan. No office in July, 1947.
3. Argentina. He applied and was refused.
4. Australia. He applied and was refused.
5. Austria. No office in July, 1947.
6. Belgium. He applied and was refused.

7. Bolivia. He applied and was refused.

8. Brazil. He applied and was refused.

9. Burma. No office in July, 1947. (*Free 1-8-48.*)

10. Canada. He applied and was refused.

11. Chile. He applied and was refused.

12. China. No office in July 1947. (*Part was under control of Russia and part under U. S.*)

13. Columbia. He applied and was refused.

14. Costa Rica. He applied and was refused.

15. Cuba. He applied and was refused.

16. Czechoslovakia. No office—(*Behind Iron Curtain*).

17. Denmark. He applied and was refused.

18. Dominican Republic. He applied and was refused.

19. Ecuador. He applied and was refused.

20. Egypt. He applied and was refused.

21. El Salvador. He applied and was refused.

22. Estonia. No office (*Behind Iron Curtain*).

23. Ethiopia. No office (*Controlled by Enemy—Italy*).

24. Finland. He applied and was refused.

25. France. He applied and was refused.

26. Great Britain. He applied and was refused.

27. Greece. He applied and was refused.

28. Guatemala. He applied and was refused.

29. Germany. No office (*Enemy Country.*)

30. Haiti. He applied and was refused.

31. Honduras. He applied and was refused.

32. Hungary. No office (*under Control of Russia.*)

33. Iceland. No office (*under Control of Denmark, who refused*).

34. India. No office (*under Control of British Crown, who had refused*).

35. Iran. Office was closed.

36. Iraq. No office in July 1947.

37. Ireland. No office in July 1947.

38. Israel. No office in July 1947 (*British Mandate till 5-14-49*).

39. Italy. Enemy Country.

40. Lebanon. No office (*British Controlled*).

41. Liberia. Negro Republic.

42. Lithuania. No office (*Behind Iron Curtain*).

43. Luxembourg. No office (*Control of Allied Military Authority*).

44. Mexico. He applied and was refused.

45. Monaco. Required $5,000 cash for entry. (*Relator was imprisoned for 5½ years, and without funds.*)

46. Netherlands. He applied and was refused.

47. New Zealand. He applied and was refused.

48. Nicaragua. He applied and was refused.

49. Norway. He applied and was refused.

50. Pakistan. No office (*Member of British Comm. of Nations*).

51. Panama. He applied and was refused.

52. Paraguay. He applied and was refused.

53. Peru. He applied and was refused.

54. Russia. Behind the Iron Curtain.

55. Poland. No office (*Behind Iron Curtain*).

56. Roumania. No office (*Behind Iron Curtain*).

57. Portugal. He applied and was refused.

58. Spain. He applied and was refused.

59. Sweden. He applied and was refused.

60. Switzerland. He applied and was refused.

61. Syria. No office (*French Mandate*).

62. Turkey. He applied and was refused.

63. Union of S. Africa. He applied and was refused.

64. Uruguay. He applied and was refused.

65. Venezuela. He applied and was refused.

66. Yugoslavia. No office (*Behind the Iron Curtain*).

67. Bulgaria. No office (*Behind the Iron Curtain*).

Norway, Sweden, Denmark, Italy were applied to although the record of notice to those countries is not available. However their consuls refused for the same stated reasons.

We must also bear in mind that Relator had been in custody since December 9, 1941, that he had no income and was without funds.

(g) WERE HIS EFFORTS TO DEPART HONEST?

Judge McLaughlin, in his opinion (R-41) said there were nations that were not notified, and named:

Germany (29). These were enemy countries.
Austria (5).
Yugoslavia (66).
Roumania (56). These were all behind the iron curtain,
Hungary (32).
Bulgaria (67). also governments that would have im-

Albania (1).	prisoned him.
China (12).	Which had no reliable government, but was partly under control of Russia and partly under control of U. S. Military Government.
India (34).	Which was part of British Empire, and governed from London.
Iraq (36).	Which had no office or consul.

Of course Respondents did not need to notify the enemy governments not to receive him; and there was no need to notify governments that did not have consular offices or means by which Relator's application for visa could have been accepted. Mr. Justice McLaughlin said there was a wide choice of places to which Relator could have gone, and cited Austria (5) India (34) and Yugoslavia (66), but, as we have just shown, that was not so. The Judge then went on to say,

> "It would seem that appellant was faced with no real dilemma. He just did not bother." (R-41.)

Under the decisions cited, Relator was entitled to show any real efforts that he made to voluntarily depart, and why he did not succeed. The Court did not have a right to pass on the validity of his efforts, until it had given him an opportunity to testify to what he had done. The Lower Courts, in this case, refused to permit Relator the opportunity and right under the cases to show that it was impossible for him to depart voluntarily. The Dorfler case[10] was cited as authority for the decisions by both the District Court and the Court of Appeals, although the Hoehn case[11] subsequently explained that case. The fact that the Supreme Court refused certiorari in each of those cases was given as the reason for their decisions, yet the Relator in each of those cases had failed to offer to prove that he had made any efforts to voluntarily depart.

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[10] U. S. *ex rel* Dorfler *v.* Watkins (Note 5, *supra*).

[11] U. S. *ex rel* Hoehn *v.* Shaughnessy (Note 4, *supra*).

That is the difference in the instant case. This is the only case, to our knowledge, where Relator offered to show that he attempted to depart, that the Respondent had interfered with his efforts and that his inability to depart was the direct result of Respondent's actions. That is the very proof the cases demanded of him, and the proof they refused to permit him to offer.

Respondent further defends by saying that even if the United States Government requested certain other governments not to receive Relator, that the Governments did not have to comply with the request. Legally no, but practically yes. At least that was the result. It is not for this Government to decide that Relator must or must not go to another country whose principles of Government are compatible with ours or his.

Ia.

The effect of a denial of certiorari.

Respondent has stressed the refusal of the Supreme Court to allow certiorari in the two cases that it cites as authority for its defence, *i. e.*, the Dorfler[10] and Hoehn[11] cases; and argues that the denial of certiorari is an affirmance by the Supreme Court of the Lower Court decisions, and of their refusal to allow this Relator a fact issue. This is not so, for Mr. Justice Reed said:[12]

> "it is a well established rule that a denial of certiorari does not prove anything except that certiorari was denied."

That case has become a standard authority, wherein two concurring judges and the three dissenting judges all agreed that denial of certiorari means nothing as to the merits. Dictum joined in by a majority of the Supreme Court is the best available authority.

This Lower Court likewise reviewed a like situation in an opinion filed October 26, 1951.

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[12] Darr *v.* Burford, 339 U. S. 200 at 217; see also U. S. *ex rel* Auld *v.* Warden, 187 Fed. 2nd 615; McGarty *v.* O'Brien, 188 Fed. 2nd 151.

Where the Judge said:

> "Our narrower question is: What effect in the Lower Federal Courts is to be given to the denial of certiorari by the Supreme Court?"[13]

He then cited at length from the Darr case[12] and concluded that certiorari did not relieve the Lower Court from an examination of the facts. He described it as uncomfortable for the Lower Court to sit in, what is in effect a review of the Higher Court, and he would surely wish to be relieved, but no directions are given to the Lower Court by the denial of certiorari.

Judge Goodrich then concluded with these words,

> "We think that what we must do, until we are told to the contrary, is to follow the well established rule that the denial of certiorari does not prove anything."

It is the same as though the Supreme Court had never seen the case nor considered it. It is a Lower Court decision. Nothing more.

II.

An enemy alien has been denied the benefits of Procedural Process, under the Fifth Amendment.

Mr. Justice Chase in the Von Heymann case (*supra*) said that the power to remove was vested in the President, in certain cases, to maintain the Security of the country. The Presidential Proclamation was made July 14, 1945. Relator was in custody from 1941 until 1947, when the Defendant decided to remove him. The War was over. The Government was seeking a rapprochment with Germany. Relator has been free since 1947. The Court in that case went on to say:

> "But tho the Statute under which appellee is restraining Relator, pursuant to executive orders, is ap-

[13] U. S. *ex rel* Smith *v.* Baldi. # 10,433, Third Circuit (not yet recorded).

plicable, it does not follow that the present restraint is lawful."

We quote the Japanses Immigrant case[14].

> "This Court has never held, nor must we now be understood as holding, that Administrative Officers, when executing the provisions of a Statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. Therefore it is not competent for—an executive officer,—arbitrarily to cause an alien—even tho illegally here—to be taken into custody and *deported without giving him* all opportunity to be heard,—no such arbitrary power can exist where the principles involved in due process of law are recognized."

An alien within the United States, particularly if lawfully here, unlike one applying at the border, is entitled to the full benefits of procedural due process under the Fifth Amendment.[15]

This must mean that in a removal proceeding grounded in National Security, as in all other proceedings, expulsion may be ordered only in accordance with law, after a fair hearing at which the alien is fully apprised of the evidence against him and given an opportunity to be represented by Counsel, to refute the charges and to present countervailing evidence[16] and the decision must be based on the evidence in the Record.[17]

This is a removal case, but an analogy is a deportation case in which limited judicial review can be invoked by Habeas Corpus, and the inquiry then is whether a fair hearing in conformity with law was had on the basis of substantial evidence.[17] That is our instant case. As in the Von Kleczkowski case (*supra*) Relator sought to prove not that the decision-

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[14] The Japanese Immigrant Case, 189 U. S. 86 (23-4 U. S. Rep. 309).

[15] Wong Yang Sung *v.* McGrath, 339 U. S. 33 (1950) (70 U. S. Rep. 445).

[16] Whitfield *v.* Hanges, 222 Fed. 745.

[17] Vajtauer *v.* Commissioner, 273 U. S. 103 (47 U. S. Rep. 303); Bridges *v.* Wixon, 326 U. S. 135 (65 U. S. Rep. 1443).

was wrong, but that evidence was improperly received, that he was never acquainted with the charges, nor faced with his accusers, that the evidence was never known, and but for that unproduced evidence, it is wholly speculative, yes, in this case definitely determined that no adverse finding could have been made as Mr. Justice Jackson said in his dissent in the Knauf case:[18]

> "Congress will have to use more explicit language than any yet cited before I will agree that it has authorized any administrative officer to break up the family of an American citizen * * *"
>
> "I cannot agree that it (Congress) authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it."
>
> "I should direct the Attorney General either to produce his evidence justifying exclusion, or to admit Mrs. Knauf to the country."

The above is particularly applicable in the instant case because Jaegler was at the outset and continuously thereafter informed that he was not entitled to know the charges leveled against him, that he was not entitled to be represented by Counsel and that he was not entitled to produce witnesses on his own behalf. In connection with the proceedings which resulted in the removed order. This is what we mean when we say he was denied *due process of law.*

This question has not been before the Supreme Court except in the Ludecke Case (*supra*) where relator did not have counsel but argued the case himself as a layman, and when questioned by the Court as to what he meant by due process, merely said, "I was denied due process," without explaining what he was denied.

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[18] Knauf *v.* Shaughnessy, 338 U. S. 537 (70 U. S. Rep. 309); Klaprott *v.* United States, 335 U. S. 601; 336 U. S. 942 (69 U. S. Rep. 384).

III.

Was the removal "Order" in violation of the spirit and letter of international agreements?

At the outbreak of activities, on December 8, 1941, an emergency arose which required that our Government take every precaution to protect itself and our country. That was common sense, and as citizens we are thankful that it was done. Along with thousands of other persons, Relator was detained in custody "for the duration of the emergency". To all intents and purposes, the emergency ended in 1945. Congress has now terminated the war with Germany. He was only interned during the emergency to prevent him from doing any harm, not because he had done any harm already. It was a preventive measure only. His record is clean.

Relator was released, on parole, in July 1947, and has been at unrestrained liberty from then to the present time. If there was any justification for his detention in 1941, it certainly has long since ceased to exist. We can only surmise that the cause has ceased to exist, but we do not yet at this late date know what the cause for the arrest was. We were never told.

It is to the pressing of the action for Relator's removal in the year of Grace 1951, that we now address ourselves. In the Preamble to our own Constitution, we declared "all men are endowed by their Creator with certain inalienable rights—among these—life, liberty and the pursuit of happiness"; but of what use are they to Relator, if he can not enjoy them. Remember, he was and is lawfully within this country and therefor entitled to the enjoyment and protection of those rights.

Methinks it was for the preservation of human rights that we fought our wars, including, with much protestation, the last two in Europe. In order to safeguard the rights of individual people, we then caused to be formed the United Nations and the United Nations Charter. It was prepared here, signed here, fought for here as well as in Korea. It is the Law of this Counrty for it was ratified by Congress

on July 28, 1945. Article 55 was addressed to the observance of human rights and the preservation of human freedoms. In recommending the adoption of the Participation Act of 1945, the President said: "our first need is to take part in the several agencies" of that organization.

Our Country took part in a number of conferences with other nations, resulting in the adoption of Rules for the Emergency Advisory Committee for Political Defence, and the Act of Chapultepec. The rules were formed and adopted at our insistence, and on April 12, 1946 the Emergency Advisory Committee adopted Resolution XXVI, which recommended a uniform standard for all proceedings relative to removal, and proposed certain criteria as to what constituted "dangerous persons". Paragraph 3 a-b set forth some considerations to be considered in determining the advisability of removing such persons. These were later incorporated into the Inter-American Treaty of Reciprocal Assistance of September 2, 1947.

Relator has been the husband of an American citizen since 1930, and has lived with her and supported her during all of that time, except during his incarceration.

We must assume that our Government intended to be bound by the United Nations Charter and the other International Agreements, because we claim to be fighting to preserve the sanctity of International Agreements. They may not be Treaties; but Presidential Proclamations, and private decisions of the Attorney General's Office are not, either.

While Resolution XXVI was specifically addressed to the control and detention of persons who actively supported the war efforts of the enemies, it was also intended to cover that much larger group who were considered dangerous or possibly dangerous. It recited that almost all countries limited the measures taken to detention—either for humanitarian or security reasons, and that many were set free before the end of 1945. It recited that Resolution XX only recommended detention for the duration of the War; and that

any one really dangerous should not be released, even to his own country. It defined as follows:

Part II, (A) Criteria for determining whether a person is dangerous, (1) dangerous persons—those who have engaged in

(a) "* * * *espionage, sabotage or other subversive Acts* to the detriment * * *"

"It shall not be necessary to have a penal conviction * * * but to have proof of such facts.

(b) *Military participation.*

(c) *Participation in propaganda or commercial operations.*

Different treatment was provided for different degrees of dangerousness.

By Paragraph A-2 of the Resolution itself, dangerous persons were classified as above set forth, and by Paragraph A-3 it was suggested that even if such person was deemed dangerous, it should not apply to a person who could show that his spouse * * * was a national of an American Republic and that the conjugal ties had been established and are maintained in good faith.

(Attached to and forming part of Defendant's Motion to Dismiss the Petition for Habeas Corpus. Excerpts therefrom (R-28)).

IV.

Whether the Joint Resolution of Congress, approved October 19, 1951 (Public Law 181; 82nd Congress, chapter 519; 1st Session; N. J. Res. 289) terminating the War with Germany, also terminated the authority and power of the President, and hence the Department of Justice to remove Relator:

Relator was ordered removed by the President, under authority of the Alien Enemy Act of 1798; as amended. He was ordered removed "as a preventive measure"; possibly

to insure the safety of the country. There has never been any intimation that he had been guilty of any offense, overt or otherwise. If there had been the slightest evidence of his guilt, he would have been indicted and tried. He would certainly not have been set at large, as he has been since 1947. He was, like hundreds of other aliens, protected from themselves and kept away from any possibility of trouble. He was kept in detention camps, not in prison. He was an enemy alien only because he was a native of an enemy country, not because he was an enemy.

Congress passed the Joint Resolution terminating the War with Germany on October 19, 1951, and the President by Proclamation 2950 (16 Federal Reg. 10915) announced that fact as accomplished.

Hence we should consider the effect of that Resolution on the status of the Relator, independent of the reasons previously argued.

Justice Learned Hand[19] held:

> "We must dispose of Orders entered in Habeas Corpus Proceedings according to the law as it exists at the time when we decide the appeal, and not at the time when the Order itself was entered."

What is the law and its application at this time? It is that the Alien Enemy Act of 1798 as amended and the Presidential Order pursuant thereto are no longer effective because the facts on which the Order was predicated no longer exist. The Resolution of October 19, 1951 terminated that.

Respondent has suggested that the Statute of July 30, 1947 c 388 section 1 (61 Statute 633) continues the status of this Relator; that he was guilty of some thing then and so he continues to be guilty.

The relative part of that Statute is quoted,

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[19] U. S. *ex rel* Wiczynski *v.* Shaughnessy, 185 Fed. 2, 349, also U. S. *ex rel* Pizzuto *v.* Shaughnessy, 184 Fed. 2, 666; U. S. *ex rel* Ludecke *v.* Watkins, 163 Fed. 2, 143; 335 U. S. 160.

> "The *Repeal of any Statute* shall not have the effect to release or extinguish any penalty, forfeitive or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper actions or prosecution for the enforcement of such penalty."

That would possibly be so if he had been guilty of any overt act, or indicted for such. He was not. He was detained in custody, out of harm's way. The authority to remove lasted only so long as a declared war existed and peace had not been formally declared.[20] The words of the Act "the repeal of any Statute shall not have the effect to release or extinguish any penalty, forfeiture or liability occurred" does not apply to the present detention case. Relator had not been penalized, nor had he forfeited anything nor incurred any liability.[21] The Government had restrained his liberty temporarily. He has not voluntarily incurred any punishment.

Under the Common law, the repeal of a Statute terminated the right to punish under it. The present act, being an exception to the Common Law, must be strictly construed[22] and it must be limited to the repeal of Statutes and not to regulations promulgated by an administrative officer under legislative authority. It has been held that such section of the Statute of 1947 is not applicable where the Statute itself is not repealed.[23] The Statute of 1798 was not repealed. The State of War was terminated. A fact changed. The law of the Statute remained valid. It was the Presidential Order, and the Removal Order that were no longer effective, because the facts which caused the authority of the Act of 1798, as amended, to be exercised no longer existed; that is a state of war.

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[20] U. S. *ex rel* Ludecke *v.* Watkins, 335 U. S. 160; U. S. *ex rel* Kessler *v.* Watkins, 163 Fed. 2nd 140.

[21] Rodgers *v.* United States, 158 Fed. 2nd 835.

[22] U. S. *v.* Auerbach, 68 Fed. Supp. 776.

[23] U. S. *v.* Chambers, 291, U. S. 217.

The Saving Statute of 1947 does not apply, because there was no repeal of a Statute or a law. The exact words of the Statute itself make it apply only in the case of the repeal of a Statute.

Respondent has suggested that Relator's freedom since July 1947 was due to an observance of Rule 45 of the Supreme Court of the United States. At no time after July 1947, did the Government make any attempt to restrain Relator's freedom or even intimate that he might be dangerous to the National Security. If they had so deemed him dangerous, they could have requested the Lower Court to restrain his liberty under Rule 45.

No better result could be obtained in the instant case by remanding the case back to the Lower Court for consideration of the effect of Public Law 181, being the Joint Resolution of Congress of October 19, 1951 terminating the War.

V.

For the reasons already advanced, the Circuit Court of Appeals, by its opinion of April 2, 1951, erred.

CONCLUSION.

It is therefore respectfully submitted

THAT the Resolution of Congress of October 19, 1951 terminating the war with Germany, likewise terminated the authority of the President to order the removal of Relator,

THAT there now exists no authority to remove Relator or to continue or sustain the present order of removal,

THAT the order remanding the Relator to the custody of the Respondents is now invalid and should be ordered rescinded,

THAT the prior question of the deprivation of Relator's right of voluntary departure is therefor moot,

THAT the Decrees of the Lower Courts should be vacated, and Relator discharged, released and permanently, set at liberty,

THAT if the question of the depreviation of Relator's right to voluntarily depart under the removal order is not moot, then the Relator is entitled to show that the government actions did effectively nullify his efforts, and that he is entitled to have the fact issue tried,

THAT Relator was deprived of the right to procedural due process under the Fifth Amendment,

THAT the Removal Order was in violation of International Treaties and Agreements,

THAT the United States Court of Appeals for the Third Circuit erred in affirming the Order of the District Court, dismissing the Writ of Habeas Corpus and remanding Relator to the custody of Respondent,

and therefore

the judgment of the Court below should be reversed, with directions to remand the cause to the District Court for entry of Appropriate Order or Decree discharging and releasing Relator from custody, or

in the alternative to direct the District Court to award Relator a trial issue of fact.

Respectfully submitted,

GEORGE C. DIX,
GORDON BUTTERWORTH,
Counsel for Petitioner.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067, as amended, 50 U.S.C. 21, provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable, the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (10 Fed. Reg. 8947):

A PROCLAMATION.

Whereas section 4067 of the Revised Statutes of the United States (50 U.S.C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U.S.C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war

between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungry, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

By the President:

[SEAL.] HARRY S. TRUMAN.

JAMES F. BYRNES,
Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189), pursuant to Presidential Proclamation 2655:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U.S.

Sec.

30.71 Removal from the United States of alien enemies.
30.72 Order of the Attorney General.
30.73 Service of removal order on alien enemy.
30.74 Thirty-day period for voluntary departure.
30.75 Involuntary removal from the United States.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U.S.C. 21.

§ 30.71 *Removal from the United States of alien enemies.*—The Proclamation of the President of the United States, No. 2655 (10 F.R. 8947), dated July 14, 1945, provided in part:

"All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe."

§ 30.72 *Order of the Attorney General.*—When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principles of government thereof, an order will be signed by

the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen, or subject.

§ 30.73 *Service of removal order on alien enemy.*—A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74 *Thirty-day period for voluntary departure.*—An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.*—In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM CLARK, *Attorney General.*

(F. R. Doc. 45-18005; Filed Sept. 27, 1945: 10:11 A.M.)

No. 275

In the Supreme Court of the United States

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UNITED STATES OF AMERICA EX REL. HUBERT JAEGGLER, PETITIONER

v.

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OPINIONS BELOW

The order of the District Court for the Eastern District of Pennsylvania, discharging the writ of

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[1] Ugo Carusi has not been Commissioner of Immigration and Naturalization for some time, but Carl Zimmerman is still District Director for District No. 2 of the Immigration and Naturalization Service. Accordingly, there is no problem of abatement in this case.

habeas corpus (R. 45), is not reported. The opinion of the Court of Appeals for the Third Circuit (R. 50) is reported at 187 F. 2d 912.

JURISDICTION

The judgment of the Court of Appeals was filed on April 2, 1951 (R. 56). On June 27, 1951, an order extending the time for filing a petition for a writ of certiorari to August 29, 1951, was issued by Mr. Justice Black (R. 57). The petition for a writ of certiorari was filed on August 24, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented involve the validity of an order of the Attorney General directing petitioner's removal to Germany as an alien enemy. The primary issues are:

1. Whether petitioner has been deprived of his privilege of voluntary departure before removal, accorded him by the Alien Enemy Act of 1798, by the action of the State Department in notifying various allied and neutral countries, chiefly in the Western Hemisphere, that petitioner was a person deemed dangerous to hemisphere security.

2. Whether anything in the proceedings resulting in the order of removal deprived petitioner of due process of law.

STATUTE, PROCLAMATION, AND REGULATIONS INVOLVED

The pertinent provisions of the Alien Act of 1798, R. S. 4067, as amended, 40 Stat. 531, 50 U.S.C. 21, are set out in Appendix A, *infra*, p. 10. Presidential Proclamation 2655, 10 Fed. Reg. 8947, and the Attorney General's Regulations pursuant thereto are set forth in Appendices B and C, respectively, *infra*, pp. 11-16.

STATEMENT

Petitioner is a German national, resident in Philadelphia, who was interned during the war as an enemy alien. In May, 1946, after a hearing, the Attorney General, acting under Presidential Proclamation 2655 (*infra*, pp. 11-13), pursuant to the Alien Enemy Act (*infra*, p. 10), ordered petitioner's removal to Germany. In accordance with the practice under the Attorney General's regulations, *infra*, pp. 15-16, petitioner was released on parole for thirty days, in order to settle his affairs and to permit him to leave the United States voluntarily (R. 19). Instead, he filed a petition for a writ of habeas corpus, based chiefly on the theory that he had been deprived of the kind of a hearing to which he felt himself entitled (R. 3). Respondents' return to the writ (R. 12) admitted most of the material facts and contended that they constituted no basis for relief (R. 16).[2] Petitioner thereupon

[2] An issue was raised at this point as to whether the court had jurisdiction to issue a writ for the production of the body of a relator who was free on parole, but the District Court's resolution of this issue in petitioner's favor was not challenged in the court below.

filed a traverse to the return (R. 19), alleging that the respondents had effectively deprived him of his opportunity to depart voluntarily to a country of his choice. This result, he alleged, was brought about by the action of the State Department in circularizing all the Western Hemisphere nations and certain European countries with a so-called blacklist containing the names of 417 dangerous enemy aliens, among whom petitioner was included (R. 21). This blacklist, petitioner contended, had the practical effect of inducing the circularized nations to deny him visas (R. 20). On respondents' motion, the District Court, holding in effect that the facts as alleged in the petition, the traverse, and the answering affidavits of the respondent admitting the circularization of the list (R. 26), did not present grounds for relief, discharged the writ (R. 45). On appeal, the court below affirmed this order of dismissal (R. 56).

ARGUMENT

1. This is another in a series of cases which have challenged the validity of the State Department's action in circularizing its list of German aliens dangerous to Western Hemisphere security. These challenges have up to now been uniformly rejected, and this Court has refused to consider them. Cf. *United States* ex rel. *Dorfler* v. *Watkins*, 171 F. 2d 431 (C.A. 2), certiorari denied, 337 U. S. 914; *United States* ex rel. *Hoehn* v. *Shaughnessy*, 175 F. 2d 116 (C.A. 2), certiorari denied, 338 U. S.

872;[3] *United States* ex rel. *Aigner* v. *Shaughnessy*, 175 F. 2d 211 (C.A. 2). The facts in these cases were not substantially different from those of the present case; and the decision below was, we submit, manifestly correct.

The court below recognized that the Alien Enemy Act precludes the Attorney General from removing an alien until he "neglects" or "refuses" to depart voluntarily, after a reasonable opportunity to do so. *United States* ex rel. *Von Heymann* v. *Watkins*, 159 F. 2d 650 (C.A. 2). But it correctly held that petitioner in this case has not been deprived of this privilege of voluntary departure. The *Dorfler* case stated the rule in these terms: "The privilege of voluntary departure does not imply that the alien must be able to go to the country of his choice. So long as there is any foreign country to which he could have gone, his failure to go there is a 'neglect' or 'refusal' to depart voluntarily. Hence a communication by the State Department to a foreign country, which that country may or may not heed, cannot be regarded as an unlawful restraint on the alien's voluntary departure." 171 F. 2d 431, 432. The circumstances of the present case demonstrate both the present applicability and the correctness of this rule.

The list of dangerous enemy aliens was circulated to the other American nations in compliance

[3] The Government's Briefs in Opposition in both the *Dorfler* case (No. 655, Oct. Term, 1948) and the *Hoehn* case (No. 308, Oct. Term, 1949) deal with this contention.

with Resolution VII of the 1945 Inter-American Conference of Mexico City, 12 Dep't State Bull. 344, which resolution called upon all the American nations to prevent such persons from remaining in the Western Hemisphere (R. 27). The obvious purpose of the Resolution was to extend, on a hemispheric basis, the same policy of discretionary removal that the fifth Congress enacted for the United States in the Alien Enemy Act. Common sense dictates that steps be taken, in the interest of the common defense, to hinder dangerous elements removed from any American nation from transferring their activities elsewhere in the Western Hemisphere. This policy was crystallized in the program contemplated by the Mexico City Conference (R. 33), and the circularization was an effort to ensure that all of the American Republics were aware that the listed persons might disturb or threaten the individual or collective security and welfare of the Western Hemisphere. The statutory privilege of voluntary departure cannot reasonably be read as requiring the United States to remain silent while such elements make their way into other nations. The latter in all probability would sooner or later in turn be faced with the necessity, for their own security, of expelling them.

Thus, it follows that the privilege of voluntary departure cannot mean that the petitioner must be left free to go to whatever place he chooses. At most, it could only mean that he must be free to go

somewhere—presumably to a country with whose principles of government his allegiance would be compatible. Even if Germany were the only country which would receive petitioner, he could not complain, for this would merely mean that only in Germany was he not considered subversive.

Petitioner, in an apparent attempt to distinguish this case from the facts of the *Dorfler* case, criticizes the enumeration by the court below of a number of countries outside Germany and the Iron Curtain nations, which were not circularized by the State Department, but to which petitioner did not bother to apply (R. 54). The petition for a writ of certiorari lists a large number of nations which petitioner claims either refused him visas or had no consulate in New York. These allegations are not supported by the record.[4] The only specific statement in the record on the matter shows that, besides the Latin American republics, the blacklist was circulated to Canada, England, France, Switzerland, Spain, Portugal, and Sweden (R. 27). This would seem to leave petitioner, in Western Europe alone, such available alternatives

[4] The only indications in the record of any attempt by petitioner to contact any of these countries are those inferable from the allegations in the traverse to the return that "Relator has been informed by his attorneys that * * * it is useless for him to make application to any Consul to go to any other American country, or any European country other than to Germany." (R. 22), and in the affidavit of petitioner's counsel that "Relator * * * tried to obtain Visas and was refused by reason of the fact that his name appeared on the list of 417 enemy aliens * * *" (R. 39).

as Norway, Denmark, the Low Countries, and Italy, which were apparently not circularized.

It should be pointed out, finally, that the State Department's circulars did not make it impossible for listed aliens to enter the circularized nations. The circulars pointed out that the United States was in no way preventing the listed aliens from entering the other nations, if these nations were willing to admit them (R. 27-29).[5] The necessary conclusion from all these facts is that petitioner was clearly afforded the statutory opportunity to leave voluntarily.

2. Petitioner's second contention is that the hearing afforded him before a Repatriation Board, at which time it was determined to remove him, failed to conform to the requirements of due process. This Court has disposed of this contention in *Ludecke* v. *Watkins*, 335 U. S. 160, which held that removal of an alien enemy may be effected without hearing. In any event, there is no specification of any aspects in which the procedure failed to provide due process.[6]

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[5] An instance is reported in which Brazil issued a visa to an enemy alien notwithstanding the appearance of his name on the circularized list. See R. 19, *United States* ex rel. *Dorfler* v. *Watkins*, No. 655, October Term, 1948.

[6] Petitioner makes certain other contentions, which appear to be frivolous. He contends that the removal order violates international agreements to which the United States is a party; but he points to no provision of any agreement, nor are we aware of any, which could be thought to impair the power of the United States to remove alien enemies in time of war.

CONCLUSION

The decision below is correct and contains nothing which warrants review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
T. S. L. PERLMAN,
Attorneys.

SEPTEMBER, 1951.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067, as amended, 50 U.S.C. 21, provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (10 Fed. Reg. 8947):

A PROCLAMATION

Whereas section 4067 of the Revised Statutes of the United States (50 U.S.C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U.S.C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United

States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

By the President:

[SEAL.] HARRY S. TRUMAN.

JAMES F. BYRNES,
Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189), pursuant to Presidential Proclamation 2655:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U.S.

Sec.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U.S.C. 21.

§ 30.71 *Removal from the United States of alien enemies.*—The Proclamation of the President of the United States, No. 2655 (10 F.R. 8947), dated July 14, 1945, provided in part:

"All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be sub-

ject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe."

§ 30.72 *Order of the Attorney General.*—When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principles of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen, or subject.

§ 30.73 *Service of removal order on alien enemy.*—A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74. *Thirty-day period for voluntary departure.*—An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole safeguards in order that the alien enemy may

settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.*—In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM CLARK, *Attorney General.*

(F. R. Doc. 45-18005; Filed Sept. 27, 1945; 10:11 A.M.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 — 966488, 20

No. 275

In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

This memorandum is directed to the issue raised in petitioner's "Memorandum and Supplement to Brief of Petitioners sur Petition for Certiorari," recently filed in this Court.

As petitioner points out, on October 19, 1951, the President signed Public Law 181, 82d Congress, the "Joint Resolution to terminate the state of war between the United States and the Govern-

ment of Germany." The President has also issued a Proclamation proclaiming that the state of war between this country and Germany terminated as of October 19, 1951. Proclamation 2950, 16 Fed. Reg. 10915. Petitioner's claim is that this formal ending of the war with Germany ended all power in the President or the Attorney General to remove him, a German national, under the Alien Enemy Act of 1798.

We recognize the force of the contention that, regardless of the prior issuance of a valid removal order, the power of the President (and his delegates), under the 1798 Act, actually to remove an alien enemy lasts only so long as a declared war is in existence and peace has not been formally proclaimed. Cf. *Ludecke* v. *Watkins*, 335 U.S. 160, 166-170; *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140, 142-143 (C.A. 2); *United States ex rel. Ludecke* v. *Watkins*, 163 F. 2d 143, 144 (C.A. 2).

On the other hand, it may very well be that the removal power does not terminate with respect to an enemy alien, like petitioner, against whom a valid removal order was issued during the declared war but who could not physically be removed from the country during that period because of the pendency of habeas corpus proceedings brought on his behalf. Petitioner was formally ordered removed in May 1946, and action to effect this order was taken in April 1947. Habeas corpus proceedings were filed in May 1947, and the four and one-half

years since that time have been taken up with petitioner's attempt, through habeas corpus, to prevent his removal. In view of contentions as to the possible applicability of Rule 45 of the Rules of this Court—"Custody of Prisoners Pending a Review of Proceedings in Habeas Corpus"[1]—the Government did not remove petitioner to Germany while his habeas corpus proceedings were pending in the district court, the court of appeals, or this Court. The delay in execution of the removal order is thus attributable solely to petitioner and not to the Government; and a strong argument can be made that, at least in this type of case, the removal power does not terminate with the ending of the war. Whether or not the General Savings Clause (1

[1] "1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

"2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

"3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

"4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard."

U.S.C., Supp. IV, 109)[2] is strictly applicable, there is good reason to apply here its general policy of continuing in effect all sanctions for a "penalty, forfeiture, or liability" incurred under a repealed or temporary statute. Cf. *United States* v. *Powers*, 307 U. S. 214, 217.[3]

In these circumstances, if the Court does not desire to decide the matter for itself after briefs and argument, we suggest that the case be remanded to the Court of Appeals for the Third Circuit for consideration of the effect of Public Law 181, approved October 19, 1951, on petitioner's status and the Attorney General's removal powers. This has been the course followed in other instances in which a new statute has been suggested by one of the

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[2] 1 U.S.C., Supp. IV, 109 provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. *The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.* [Emphasis supplied.]

[3] In the Government's main brief in *Ahrens* v. *Clark*, No. 446, October Term, 1947, at pp. 17-18, fn. 14, as well as in the memorandum for the respondent in that case in answer to the petitioners' motion for a stay under Rule 45 (1), the effect of Rule 45 in this type of case was discussed, and it was pointed out that "The problem would reach its most acute point if petitioners continue their litigations until a formal treaty of peace terminates the state of war."

parties as vitally affecting the case. *Molsen* v. *Young*, 340 U. S. 880 (Subversive Activities Control Act of 1950); *Estate of Schroeder* v. *Commissioner*, 338 U. S. 801, 884 (Technical Changes Act of October 25, 1949); *Woods, Housing Expediter* v. *Durr*, 336 U. S. 942, 941 (Housing and Rent Act of 1949); *Mitchell* v. *White Consolidated, Inc.*, 336 U. S. 958 (amended Rule 73(a) of the Rules of Civil Procedure); *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 332 U. S. 840 (Labor Management Relations Act of 1947); *Alaska Juneau Gold Mining Co.* v. *Robertson*, 331 U. S. 823, 793 (Portal-to-Portal Act of 1947); *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 795 (Portal-to-Portal Act of 1947); *Sioux Tribe of Indians* v. *United States*, 329 U. S. 680, 684, 685, 758 (Indian Claims Commission Act of August 13, 1946).[4]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1951.

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[4] Only nine German nationals, including petitioner, are now under removal orders issued pursuant to the Alien Enemy Act of 1798.

APPENDIX

PUBLIC LAW 181—82D CONGRESS
CHAPTER 519—1ST SESSION
H. J. RES. 289

JOINT RESOLUTION

To terminate the state of war between the United States and the Government of Germany.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.

Approved October 19, 1951.

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OPINIONS BELOW

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opinion. The opinion of the Court of Appeals for the Third Circuit (R. 37) is reported at 187 F. 2d 912.

JURISDICTION

The judgment of the Court of Appeals was filed on April 2, 1951 (R. 43). On June 27, 1951, by order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to August 29, 1951 (R. 44). The petition for a writ of certiorari was filed on August 24, 1951, and was granted on November 5, 1951 (R. 45). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This controversy centers around an order of the Attorney General directing petitioner's removal to Germany as an alien enemy. The primary questions are

1. Whether petitioner has been deprived of his privilege of voluntary departure before removal, accorded him by the Alien Enemy Act of 1798, by the action of the State Department in notifying various allied and neutral countries, chiefly in the Western Hemisphere, that petitioner was a person deemed dangerous to hemisphere security.

2. Whether anything in the proceedings resulting in the order of removal deprived petitioner of due process of law.

3. Whether the termination of the state of declared war with Germany terminates the power to execute a removal order issued during the war and

delayed in its execution by habeas corpus proceedings.[2]

STATUTE, PROCLAMATION, AND REGULATIONS INVOLVED

The pertinent provisions of the Alien Enemy Act of 1798, R.S. 4067 *et seq.*, as amended, 40 Stat. 531, 50 U.S.C. 21 *et seq.*, are set out in Appendix A, *infra*, p. 37. Presidential Proclamation 2655, 10 Fed. Reg. 8947, and the Attorney General's regulations pursuant thereto, are set forth in Appendices B and C, respectively, *infra*, pp. 38, 41.

STATEMENT

Petitioner is a German national, resident in Philadelphia. On February 1, 1942, the Attorney General, acting under Presidential Proclamation No. 2526 (6 Fed. Reg. 6323), pursuant to the Alien Enemy Act of 1798, ordered him interned for the duration of the war. Under this order, petitioner was held during hostilities at various internment camps (R. 3-5).

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[2] A petition for certiorari, primarily raising the first question, which had been passed on by the courts below, was filed on August 24, 1951. On October 19, while the petition was pending, the Joint Resolution ending the war with Germany (P.L. 181, 82d Cong.), was approved by the President, who formally proclaimed the event on October 25. Proclamation No. 2950, 16 Fed. Reg. 10915. Thereafter, petitioner suggested that the decrees of the lower courts be vacated on the ground that the cause was moot. Respondent filed a supplemental memorandum addressed to the question thus raised as to the possible termination of the power to execute the 1946 removal order. This Court's order on November 5, granting certiorari, did not limit the issues. Accordingly, the questions raised by both original and supplemental petitions are considered in this brief.

On July 14, 1945, the President issued Proclamation No. 2655 (*infra*, p. 38), authorizing the Attorney General to remove those interned aliens whom the Attorney General deemed dangerous. Petitioner was afforded a hearing before a Repatriation Board, and on May 3, 1946, on the recommendation of this Board, the Attorney General, acting under this Proclamation, directed petitioner's removal to Germany (R. 5). Petitioner remained in custody until April 15, 1947, at which time he was given a thirty-day parole, pursuant to the Attorney General's regulations, to permit him to settle his affairs and leave the country voluntarily (R. 5, 10, 14).

Petitioner returned to Philadelphia, and there, on May 15, 1947, while on parole, obtained a writ of habeas corpus, which is the subject of this case. His application for the writ was based chiefly on the contention that he had been deprived of the kind of a hearing to which he believed himself entitled (R. 3-9). Respondent's return to the writ admitted most of the material facts and contended that they constituted no basis for relief (R. 10-14).[3]

Petitioner then filed a traverse to the return, alleging that the respondents had effectively de-

[3] The return to the writ raised the question whether the court had jurisdiction to issue a writ of habeas corpus for the production of the body of a relator who was free on parole, but the district court's resolution of this issue in petitioner's favor was not challenged in the court below. Its correctness, however, is questionable. See the Government's Memorandum with Respect to Mootness, *Ludecke* v. *Watkins*, No. 723, October Term, 1947.

prived him of his opportunity to depart voluntarily to a country of his choice. This result, he alleged, was brought about by the action of the State Department in circularizing all the Western Hemisphere nations and certain European countries with a so-called "blacklist" containing the names of 417 dangerous enemy aliens, among whom petitioner was included. This "blacklist", petitioner contended, had the practical effect of inducing the circularized nations to deny him visas (R. 15-17).

After argument on these pleadings, the district court ordered a hearing on the factual issue of whether the "blacklist" had the alleged effect (R. 18-19). Various pre-hearing procedural steps ensued, including an attempt by the petitioner to take the deposition of the Secretary of State. The respondents opposed the taking of the deposition, submitting instead affidavits of State Department personnel which set forth the circumstances surrounding the circulation of the "blacklist". The respondents also sought to have the writ discharged, on the ground that the facts as alleged by relator and set forth in the affidavits did not constitute a basis for relief (R. 19-28). The district court accepted the affidavits in lieu of the deposition, but refused to dismiss the writ (R. 33).

The matter remained under advisement until 1950. Meanwhile, in a number of cases dealing with the "blacklist" question, the Court of Appeals for the Second Circuit held that the "blacklisted"

aliens had no ground for relief, and this Court denied certiorari. Thereupon, the district court ordered a reargument and, on October 9, 1950, discharged the writ (R. 35). The court below affirmed on April 2, 1951.

SUMMARY OF ARGUMENT

I

A. Petitioner in this case was afforded the privilege that the statute gives an enemy alien of departing voluntarily. The State Department's action in circulating a "blacklist" to the American republics and to some Western European governments did not deprive him of this opportunity. The list was circulated in accordance with the recommendations of various Inter-American Conferences, for the purpose of notifying the governments involved of the identity of dangerous aliens, in the interests of hemisphere defense. This defensive purpose is thoroughly consonant with the purpose of the Alien Enemy Act, which was to protect this country from the danger of subversion by enemy aliens.

B. In any event, the statute requires no more than an opportunity for the alien to return to his country of origin; and petitioner was given more than this. The purpose of the law in granting the privilege of voluntary departure was merely to permit the alien to gather his property and to leave without the indignity of physical restraint. In these respects, the statute is more liberal to the

alien than is the common law. For petitioner, it follows that the privilege means no more than the privilege of returning freely to Germany, the country of his nationality.

C. Furthermore, there were several nations to which the "blacklist" was not transmitted and to which petitioner did not even apply. He can hardly complain that he is being deprived of his statutory right to depart voluntarily when he did not exhaust the possibilities in 1947 (when the removal order was issued) and has apparently made no real effort since 1947 to secure permission to enter another country.

II

Nothing in petitioner's hearing before the Repatriation Board constituted a denial of due process. An enemy alien has no right to a hearing, and he may not complain of any hearing which is given him as a matter of grace. *Ludecke* v. *Watkins*, 335 U.S. 160.

III

In our view, the termination of the war has not terminated the government's power to execute the removal order validly made during the war in petitioner's case. Generally, the law has been in the process of effecting a reversal of the common law policy that liabilities under a statute are remitted by the repeal or expiration of the statute. The general saving statute, 1 U.S.C., Supp. IV,

109, exemplifies the new policy by providing for the preservation of liabilities and forfeitures after repeal of a statute or the expiration of a temporary statute.

The Alien Enemy Act is a temporary statute within the meaning of the general saving clause. Also, the liability of an alien to removal appears to be a "liability" within the meaning of that clause which has always been given a broad interpretation. The Alien Enemy Act itself speaks of the alien's "liability" to removal. Moreover, the removal order can be considered a "forfeiture" of the petitioner's right to remain in this country.

Even if the case is thought not within the express terms of the saving clause, it seems to fall within the general policy which that clause attempted to write into the law, a policy which is further exemplified in cases holding that the termination of executive or administrative action under a subsisting statute does not remit liabilities created while the executive or administrative action was in effect.

This principle, exemplified by the saving clause and by these cases, is based on the desire to prevent discrimination in the application of legislation. This purpose particularly calls for application of the principle here where petitioner has succeeded in avoiding removal by four and one-half years of habeas corpus litigation.

ARGUMENT

Introduction

The Alien Enemy Act of 1798 gives the President power in time of war to provide summarily for the internment and removal of any enemy alien above the age of fourteen years. In July 1945, after the surrender of Germany, the President exercised this ancient power by proclaiming that the Attorney General should be authorized to remove any of the then interned aliens whom he deemed dangerous. The Attorney General promulgated regulations establishing a regular procedure; and, under these regulations, some 174 Germans were ordered removed.[4]

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[4] Of the total of more than one million German, Italian and Japanese alien enemies in this country at the outset of World War II, approximately 13,500 were apprehended on Presidential warrant. No more than 4,132 alien enemies were ever interned at any one time and, when Germany surrendered, approximately 2,060 remained interned. See *Annual Reports of the Attorney General* (1942), p. 219; (1943), pp. 4-5, 317; (1944), pp. 355-359; (1945), p. 374. After V.E. day, boards, established to consider further internment and repatriation, continually considered and reconsidered the cases and, by November, 1947, there remained only 174 German alien enemies interned and subject to removal orders. As of that date, 24 German alien enemies had actually been removed and four had voluntarily departed, three to South America. No action was taken to execute removal orders at that time because of the pendency of litigation, principally mass litigations, and the possible applicability of Rule 45 of the Rules of this Court. See Respondents' Memorandum in Opposition to Petitioners' Application for a Stay in *Ahrens* v. *Clark*, No. 446, October Term, 1947. After this Court's decision in *Ludecke* v. *Watkins*, 335 U.S. 160, a final general administrative review took place, as the result of which 63 German alien enemies were released, 58 were removed, 11 departed voluntarily to Argentina, and one was paroled because of

Many of these aliens sought judicial review of their removal orders on various grounds; and the available bases of objection came to be quite thoroughly canvassed by the courts of appeals. *E.g. Citizens Protective League* v. *Clark*, 155 F. 2d 290 (C.A.D.C.), certiorari denied, 329 U.S. 787; *United States ex rel. Hack* v. *Clark*, 159 F. 2d 552 (C.A. 7); *United States ex rel. Schlueter* v. *Watkins*, 158 F. 2d 853 (C.A. 2); *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. 2d 898 (C.A. 2). After this Court's decision in *Ludecke* v. *Watkins*, 335 U.S. 160—holding that the statute gave the President plenary power, not subject to judicial review; that the President's delegation of this power to the Attorney General, under Proclamation 2655, was valid; that the power extended at least until the

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physical condition. Most of the remainder, 41 in number, of the 174 German aliens originally ordered removed, were attacking prior decrees of denaturalization. The contentions raised in these joint and several litigations, mostly in the District Court for the Southern District of New York, were similar to those before this Court in *Klapprott* v. *United States*, 335 U.S. 601, *Baumgartner* v. *United States*, 322 U.S. 665, and *Knauer* v. *United States*, 328 U.S. 654. Judicial stays were issued in these denaturalization cases. Finally, judicial stays against removal were issued as to about 15 German alien enemies, some of whom were also involved in the denaturalization suits, who litigated the "blacklist" question in the *Hoehn*, *Aigner* and *Dorfler* cases, *infra*, p. 11. Seven of these were removed in June and July, 1949.

As of the present time, 13 of the 41 German alien enemies, mentioned above, have been administratively released; six more have departed voluntarily to the Argentine; eight have been removed to Germany; six have been judicially released; and eight (including petitioner) are still subject to removal orders. All were administratively paroled during the summer of 1948.

end of the declared war; and that the statute so interpreted was constitutional—the possible grounds of objection were greatly narrowed.

This is the last German alien's case still remaining in the courts.[5] Petitioner has based his attack on the removal order in part on grounds which *Ludecke* v. *Watkins* should finally have laid to rest, and in part on a different ground, which *Ludecke* did not reach, but which has been considered and rejected several times. *United States ex rel. Dorfler* v. *Watkins*, 171 F. 2d 431 (C.A. 2), certiorari denied, 337 U.S. 914; *United States ex rel. Hoehn* v. *Shaughnessy*, 175 F. 2d 116 (C.A. 2), certiorari denied, 338 U.S. 872; *United States ex rel. Aigner* v. *Shaughnessy*, 175 F. 2d 211 (C.A. 2). The statute requires, as a condition precedent to removal, that the alien enemy be given an opportunity to depart voluntarily. Petitioner does not dispute that he was allowed thirty days, pursuant to the regulations, in which to leave voluntarily, nor does he contend that the thirty-day period provided by the regulations is less than reasonable; but he urges that the Government has reduced the opportunity to an empty gesture by its action in notifying the foreign offices of many of the allied and neutral countries of the Western Hemisphere and Western Europe that he was a dangerous alien, thus inducing these countries to deny him entry.

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[5] No suits are now pending as to the seven others subject to removal orders (fn. 4, *supra*).

From this, he appears to conclude that he is entitled to be released.[6] We believe (1) that the statute cannot be read as forbidding the Government to take circularizing action like that alleged here, and (2) that, in any case, the full requirements of the statute have been met by giving petitioner an opportunity to return freely to Germany, which he had, so that any additional opportunity he had to go elsewhere, which he also had, was gratuitous.

If the case stopped here, it would present no great difficulty. But the passage of time has presented petitioner with a perhaps not unhoped-for further basis for argument. In *Ludecke* v. *Watkins*, there was elaborate discussion of the question whether the statutory power to remove was limited to the period of actual fighting. The Court concluded that the power was not so limited; but it appears to have been generally conceded on all sides that the power to order removal would lapse on the formal termination of war.[7] The Court is now squarely faced with the question whether a

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[6] Petitioner's argument amounts to the contention that he is not a person removable under the terms of the statute; this contention is open to him on habeas corpus. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 775; *Ludecke* v. *Watkins*, 335 U.S. 160.

[7] As pointed out in respondents' supplemental memorandum herein, the Government, in its main brief in *Ahrens* v. *Clark*, No. 446, October Term, 1947, at pp. 17-18, fn. 14, indicated that formal termination of war might raise a problem as to the power to execute specific removal orders, action on which was deferred or prevented during the war. See *infra*, pp. 34-35.

removal order validly made during the war can be executed after the war has been so ended.

On this issue, our position is that the order against petitioner may now be enforced. There is a clear policy running through the law, expressed both in statutes and in case law, to preserve liabilities like petitioner's liability to conform to the removal order. Particularly in this case, where the delay has been occasioned by litigation, this policy of permitting the execution of valid orders should be followed.

I

The Court Below Correctly Held That the State Department "Blacklist" Did Not Deprive Petitioner of the Statutory Privilege of Departing Voluntarily

The question presented by petitioner's attack on the State Department's "blacklist" is one of statutory construction. The Alien Enemy Act authorizes the President "to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom." In narrow focus, the question is whether petitioner has "refused" or "neglected" to depart. The court below assumed that the Act precludes the Attorney General from removing an alien until he "neglects" or "refuses" to depart voluntarily, after a reasonable opportunity to do so (R. 42). See also *United States ex rel. Von Heymann* v. *Watkins*, 159 F. 2d 650 (C.A. 2). We make the same assumption.

Since the writ was dismissed without a hearing on the facts, we shall not controvert the truth of the allegation that the so-called "blacklist" had some effect in inducing certain countries to exclude petitioner. This assumption, however, can be true only as to the American and Western European countries to which the list was circulated. It seems clear from the record that such Western European countries as Norway, Denmark, the Low Countries, and Italy, in addition to the Middle East, Asia and Oceania, and the Iron Curtain countries were not circularized; as to these we must presume that any refusal to admit petitioner was for reasons of their own, uninfluenced by any action of this Government.[8] Germany was of course not circularized, and there can be no question of petitioner's freedom to go there. We submit, moreover, that the action of circulating the "blacklist" in the circumstances of this case could not constitute a violation of the statutory privilege of departure, even if the circularization had been universal.

A. *The List Was Circulated As a Measure of Defense and Was Thus Consonant With the Purposes of the Alien Enemy Act.*

Read in the light of the clear intent of the whole statute, no provision of the Alien Enemy Act can

[8] Petitioner's list of countries, to the consulates of which he says he applied in 1947 (Pet. Br. 8-11), indiscriminately includes both the countries circularized by the State Department and many others.

be construed to forbid the Government's action in this case. On the contrary, this action—purely protective in nature and purpose—complements, rather than frustrates, the purpose of the Alien Enemy Act.

Throughout the war, the United States acted in close cooperation with the Latin American nations on the problem of preventing subversive activities by enemy nationals in the Western Hemisphere. On January 28, 1942, soon after Pearl Harbor, the Rio de Janeiro Conference of American Foreign Ministers adopted a resolution recommending measures for protection against subversive aliens. One of the recommended measures was the immediate communication among the governments of the American republics of any information that might come to hand about suspect dangerous aliens. Resolution XVII, Final Act of Third Conference of Foreign Ministers of American Republics, January 28, 1942, 6 Dep't State Bull. 128. This was the origin of the suggestion for publicizing a list of dangerous aliens.[9]

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[9] The same resolution also provided for the establishment of the Emergency Advisory Committee for Political Defense, to coordinate measures for the control of subversion. This committee, elected by the governing board of the Pan American Union, was set up at Montevideo. It adopted a resolution providing for the internment of some enemy aliens and the repatriation of others from all the Latin American countries. The United States made arrangements, through the regular international channels for exchanging belligerent nationals, to repatriate enemy aliens from the Latin American countries, as well as aliens residing here. Under this program, some 4707 German, Italian, and Japanese nationals were

This suggestion was amplified in Resolution VII of the Inter-American Conference on the Problems of War and Peace at Mexico City, February 23, 1945, 12 Dep't State Bull. 344. This resolution provided, among other things, for the taking of measures to prevent deported aliens from residing elsewhere in the Western Hemisphere. It was pursuant to this resolution that the State Department circulated to the American republics and Canada the list of 417 particularly dangerous alien enemies, requesting assurances that, if removed from this country, these enemies would not be received elsewhere in this hemisphere.

After the *Von Heyman* case (*United States ex rel. Von Heyman* v. *Watkins*, 159 F. 2d 650 (C.A. 2)) and certain district court cases had held that enemy aliens must be permitted to depart freely, the State Department withdrew its request for assurances that the listed aliens would be excluded, making clear that, while it still regarded the aliens as dangerous, the Department did not wish to interfere with any other country that might care to receive them (R. 20-26). At the same time, the same list of 417 aliens was sent to the governments of England, France, Sweden, Switzerland, Spain,

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brought to the United States from South and Central America; 2584 of these were voluntarily repatriated and 2118 were interned here. 11 Dep't State Bull. 147. After the end of hostilities, the President provided, under the Alien Enemy Act, for the removal to their native countries of those who still remained and who were unwilling to leave voluntarily. Proclamation No. 2662, 10 Fed. Reg. 11635; Proclamation No. 2685, 11 Fed. Reg. 4079.

and Portugal, with the evident purpose of extending the protective benefits of this information to these leading allied and neutral centers. No assurances of non-admission were asked of these countries.

The protective nature of these measures, and their clear purpose—the solidification among the nations opposing the Axis of a coordinated defense against wartime and postwar propaganda, espionage, sabotage, and other subversive activity—are plain on the face of the resolutions recommending them. The protective aspect of the Alien Enemy Act—the need to neutralize potential subversives—has always been recognized as its main, indeed its only purpose. See especially, Mr. Justice Black, dissenting in *Ludecke* v. *Watkins,* 335 U.S. 160, 176-177; Annals of Congress, 5th Cong., 2d. Sess. 1575, 1790-1. War having become a world-wide event, the extension of the same protective measures on a world-wide scale is only a common sense extension, in the light of modern conditions, of the principles of the Act. Certainly, the Act should not be construed to prohibit it.

We show in Section B, *infra,* pp. 18-21, that the statutory provision for voluntary departure interdicts no more than physical restraint of the alien desiring voluntarily to return to his country of origin. But, even if the Act meant more, if it forbade gratuitous blacklisting, nevertheless we submit that the self-defensive nature of the measures here in question would justify them. The Act

does not compel the Government to stand quietly by while an alien whose presence has been found to be dangerous to our security enters the country of an ally, where in all probability his presence would be equally dangerous to the security of our cause. So long as he is free to go to a country whose principles are compatible with his allegiance, and where his presence would not be harmful to our security—even if it be only Germany—the Act's condition is satisfied.

B. *The "Blacklist" Was Not Circularized to Germany and the Alien Enemy Act Requires Only That Petitioner Be Left Free to Go to the Country of His Nationality.*

The history and background of the Alien Enemy Act show that the departure provision means no more than that the enemy must be given the chance to depart voluntarily for the country of his nationality before he is forcibly removed.

The primary object of the departure privilege was to provide the alien time to gather his belongings and return home with his property, free of the indignity of being thrown out. At the time of the Act's passage in 1798, the United States was engaged in an undeclared war with France. The Act was submitted as a device for protection from subversive French aliens. Many of the French aliens, indeed many aliens of all nationalities, were either immigrants or merchants and America was a commercial nation in a commercial world. The

Fifth Congress wanted protection from espionage, but it did not want to discourage foreign immigrants and merchants from coming to this country, for trading was one of the main sources of livelihood. Congress therefore was careful to take steps to mitigate the traditional treatment of enemy aliens, especially with respect to their property.[10] See Annals of Congress, 5th Cong., 2d Sess. 1574, 1579, 1794-1796, 2000-2001. Much of the legislative emphasis was on property. Thus, the original form of the bill contained a provision for retaliation against the persons and the property of enemy aliens for severities inflicted on Americans by enemy governments. This was rejected by the House, objection being raised both to retaliation and to confiscation. Annals of Congress, 5th Cong., 2d Sess. 1786. More significantly, the second section of the Act has from the beginning consisted of careful provisions allowing aliens who become liable for removal a reasonable time to gather and remove their goods and effects. R.S. 4068, 50 U.S.C. 22, Appendix A, *infra*, p. 37.

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[10] At common law "alien enemies have no rights, no privileges, unless by the King's special favor, during the time of war." 1 Blackstone, *Commentaries* (Lewis ed., 1900) *372-373. Aliens, friends or enemies, could not own the beneficial interest in realty. *Ibid.* In time of war alien enemies' personalty and choses in action were subject to seizure. *Attorney General* v. *Weeden & Shales*, Park. 267, 145 Eng. Rep. 776 (1699); cf. *Antoine* v. *Morshead*, 6 Taunt. 237, 128 Eng. Rep. 1025 (1815); see, generally, *Johnson* v. *Eisentrager*, 339 U.S. 763, 768-9, 771 *ff.*, and *Porter* v. *Freudenberg*, [1915] 1 K.B. 857 (C.A.).

In view of this Congressional solicitude for the full recovery by the aliens of their goods and effects, it seems to us that the most reasonable reading of the voluntary departure provisions of Section 21 (the first section of the 1798 Act), taking them together with the reasonable-time provisions of Section 22 (the second section), is that their purpose was only to give the alien time to gather his effects. To this may be added a desire not to subject him to the indignity of being put bodily on board ship. There is nothing to suggest that Congress ever contemplated that an alien who was released to get his goods together and to preserve his dignity free from physical restraint would go anywhere but where the President planned to deport him, *i.e.*, to the country of his nationality.

This specific legislative background aside, the same conclusion is suggested by the general purpose of the Act. Petitioner assumes that if he can find no country but Germany which will accept him he is relieved of his liability to removal. But his dangerousness, which is the cause of the removal order, is not reduced because he cannot find some country to receive him. The grotesque result implied by petitioner's argument is that the least desirable or most dangerous alien enemies would be forced upon us. In the light of the Act's protective purpose, it seems clear to us that, even if petitioner had a justifiable complaint that the Government were taking an ignoble part in circulating the "blacklist," and even if no nation other than Ger-

many would take him, he would not be released from his obligation to depart, and hence from his liability to removal.

C. *In Any Case, the List Was Not Circulated to Many Countries to Which Petitioner Was Free to Apply But Did Not.*

In *United States ex rel. Dorfler* v. *Watkins*, 171 F. 2d 431 (C.A. 2), certiorari denied, 337 U.S. 914, the Court of Appeals said: "The privilege of voluntary departure does not imply that the alien must be able to go to the country of his choice. So long as there is any foreign country to which he could have gone, his failure to go there is a 'neglect' or 'refusal' to depart voluntarily." 171 F. 2d at 432. See also *United States ex rel. Hoehn* v. *Shaughnessy*, 175 F. 2d 116 (C.A. 2), certiorari denied, 338 U.S. 872; *United States ex rel. Aigner* v. *Shaughnessy*, 175 F. 2d 211 (C.A. 2). We think that this statement, although somewhat broader than the background and history of the statute require (see *supra*, pp. 18-21), declares the maximum privilege to which an alien enemy can aspire. Certainly, if some country is available to which he can remove himself, he "neglects" and "refuses" to depart our shores when he fails to leave for that country.

In this case, petitioner has not shown, and cannot show, that no country on earth would receive him. While it must be assumed for purposes of review that the "blacklist" had some appreciable

effect where circulated, it is clear, as we have indicated, *supra,* p. 14, that its effect was limited to those places. It was sent only to certain countries and can have had no effect on the decisions of other nations to reject petitioner's alleged applications for admission. Moreover, petitioner did not even apply to several countries, such as Austria, China, India, and Yugoslavia (see Pet. Br. 8-12).

Finally, in all fairness, it must be pointed out that petitioner has now had more than four and one-half years, since his parole in April 1947, in which to find a place to go. All this time he has been free. The Government has made no attempt to resume custody of his person, being deterred until October 1950 by the outstanding writ of habeas corpus, and thereafter by the possible applicability of Rule 45 of the Rules of this Court (which question is discussed below, at pp. 34-35). Whatever may have been the effectiveness of the "blacklist" in 1947, surely it has diminished by now. Other removed German aliens have found their way into Argentina and other places where it is common knowledge that the word of this Government is no longer heard with the same favor as four years ago.[11] The President fixed thirty days

[11] As already indicated, 17 German alien enemies voluntarily departed to Argentina after this Court's decision in the *Ludecke* case in 1948. Earlier, 3 others had also voluntarily departed to South America, 2 to Venezuela and 1 to Bolivia. Fn. 4, *supra,* p. 9.

as a reasonable time for an alien's voluntary departure, and this has been held to be reasonable. Proclamation No. 2685, 11 Fed. Reg. 4079; see *United States ex rel. Hoehn* v. *Shaughnessy*, 175 F. 2d 116, 117 (C.A. 2). If petitioner has been unable in four and one-half years to find a place to receive him, "blacklist" or not, it begins to appear that his efforts have not been unduly vigorous; not only the statute but the ordinary equities are against him. Within the meaning of the Act, petitioner has "neglected" to depart, and hence may be removed.

II

Nothing in the Proceedings Which Resulted in the Removal Order Constituted a Denial of Due Process

Petitioner also contends that the hearing before the Repatriation Board, at the time it was determined to remove him, failed to conform to the requirements of due process. It was settled by *Ludecke* v. *Watkins*, 335 U.S. 160, that removal of an enemy alien may be effected without a hearing. The statute so provides, and, as so read, does not constitute a denial of due process. *Ludecke* v. *Watkins*, 335 U.S. U.S. 160; see also *Johnson* v. *Eisentrager*, 339 U.S. 763, 775. Petitioner's reliance on cases requiring a hearing in the deportation of alien friends is obviously misplaced.

We recognize that there may be thought to be, at least conceptually, a distinction to the effect

that, while no hearing is required, any hearing which is given gratuitously must conform to the requirements of fairness. But the courts have refused to make the distinction.[12] Moreover, there is nothing in the record to show the proceedings before the Repatriation Board. The petition for the writ of habeas corpus shows that petitioner was notified of his hearing and that the hearing was held, but no more (R. 5). Beyond this, we may perhaps be indulged in the presumption that the proceedings in this case were substantially similar to those in the cases which have gone before. Cf. *United States ex rel. Schlueter* v. *Watkins*, 67 F. Supp. 556 (S.D.N.Y.), affirmed, 158 F. 2d 853 (C.A. 2).[13]

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[12] "A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized." *Ludecke* v. *Watkins*, 335 U.S. 160, 166. Accord, *United States ex rel. Schlueter* v. *Watkins*, 67 F. Supp. 556 (S.D. N.Y.), affirmed, 158 F. 2d 853 (C.A. 2); see Mr. Justice Douglas, dissenting in *Ludecke* v. *Watkins*, 335 U.S. 160, 184 n. 1.

[13] We regard as frivolous petitioner's contention that his removal violates the United Nations Charter. Nothing in the Charter affects the power to remove enemy aliens in time of war. Nor does anything in Resolution XXVI of the Emergency Advisory Committee on Political Defense help petitioner. This resolution established criteria for the State Department in determining which of the Latin American German aliens were dangerous; but this applied only to the Latin Americans, of whom petitioner is not one. Also, since petitioner is not entitled to review of the Attorney General's findings, he cannot in any event question whether the latter has conformed to the standards set out in the resolution.

III

The Termination of the War Did Not Terminate the Power to Execute a Removal Order Validly Issued During the War

The Alien Enemy Act provides that aliens are "liable" to removal by the President "whenever there is a declared war." *Infra*, p. 37. In *Ludecke* v. *Watkins*, 335 U.S. 160, the alien petitioner earnestly contended, despite the explicit reference to a declared war, that his liability to removal terminated when the fighting stopped, or at least when the danger of subversion had passed. This Court rejected that contention, pointing out that for the Court to determine when the "war" (as the term is used in the statute) came to an end would be to impinge upon a political function of Congress and the Executive. 335 U.S. at 168-169; see also *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140, 142-143 (C.A. 2).

Congress has now made the political determination that the war is ended. P. L. 181, 82nd Cong., October 19, 1951.[14] It is clear that this, by the

[14] "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however*, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including

terms of the Alien Enemy Act, terminates the power of the President to order further removals, both directly and, as was the situation in World War II, through his delegate, the Attorney General. The question before the Court, however, is whether Congress' action in ending the war operates retroactively to prevent execution of a removal order valid when issued. The answer is not free from doubt, but we think it should be in the negative.

The problem is again one of statutory construction—a question of the meaning of the Alien Enemy Act.[15] There is language in earlier opinions which can be read as saying or implying that, re-

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accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest."

[15] We think that no constitutional problem is involved. Congress clearly has the power, if it so chooses, to extend the Attorney General's authority to remove at least those aliens whom he has previously found, during the war, to be dangerous. Cf. *Mahler* v. *Eby*, 264 U.S. 32; *Fleming* v. *Mohawk Wrecking Co.*, 331 U.S. 111; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146; *McElrath* v. *United States*, 102 U.S. 426; *The Protector*, 12 Wall. 700; *Stewart* v. *Kahn*, 11 Wall. 493; *United States* v. *Anderson*, 9 Wall. 56. The question here is merely whether Congress actually has exercised the power. We recognize, of course, that the Constitution has been held to require a due process hearing for alien friends who are to be deported under the general deportation laws. *E.g.*, *Bridges* v. *Wixon*, 326 U.S. 135; *The Japanese Immigrant Case*, 189 U.S. 86; cf. *Mahler* v. *Eby*, 264 U.S. 32. But the question here is different; petitioner was an alien

gardless of the prior issuance of a valid removal order, the power of the President (and his delegates) actually to remove an alien enemy lasts only so long as a declared war is in existence and peace has not been formally proclaimed. See *Ludecke* v. *Watkins*, 335 U.S. 160, 166-170; *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140, 142-143 (C.A. 2); *United States ex rel. Ludecke* v. *Watkins*, 163 F. 2d 143, 144 (C.A. 2). Whether or not these passages should bear this interpretation, it is plain that the issue was not raised in any of the prior cases and that it is squarely presented here for the first time.[16] We shall, therefore, consider it afresh.

A. There runs through the whole law a policy of preserving legal liabilities and obligations. This policy is expressed in the general saving statute, R. S. 13, as amended, 58 Stat. 118, 1 U.S.C., Supp. IV, 109, which preserves "penalties, forfeitures, and liabilities" created by repealed statutes and by temporary statutes which subsequently expire. It is also expressed in cases preserving liabilities, penalties, and forfeitures created by executive or administrative action, afterwards repealed or ex-

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enemy when the removal order was made and the Constitution required no hearing, *supra*, pp. 23-24. The fact that in October he automatically became an "alien friend" does not, in itself, entitle him to a due process rehearing on matters already concluded.

[16] In its brief and memorandum in *Ahrens* v. *Clark*, No. 446, Oct. Term, 1947, the Government pointed out that the problem would arise if litigation continued until peace was declared. See fn. 7, *supra*, p. 12.

pired, under statutes which continue to subsist. *United States* v. *Hark*, 320 U.S. 531; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 331-333; *Rodgers* v. *United States*, 158 F. 2d 835 (C.A. 6), reversed on other grounds, 332 U.S. 371; cf. *Stillman* v. *United States*, 177 F. 2d 607, 619 (C.A. 9); see *Fleming* v. *Mohawk Wrecking Co.*, 331 U.S. 111, 116.

1. Consider first the general saving statute.[17] This was first enacted in 1871, for the purpose of reversing the common law rule that repeal of a statute remitted all liabilities incurred under it unless the repealing statute expressly saved them.[18] It changed the rule so that all liabilities are preserved unless expressly remitted.

In 1944, the statute was amended to its present

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[17] "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[18] Act of February 25, 1871, c. 71, 16 Stat. 431. For cases discussing the clause in its relationship to the common law rule, see, *e.g. Hertz* v. *Woodman*, 218 U.S. 205, 216; *Great Northern Ry. Co.* v. *United States*, 208 U.S. 452; *United States* v. *Reisinger*, 128 U.S. 398; cf. *Norris* v. *Crocker*, 13 How. 429; *The Irresistible*, 7 Wheat. 551; 1 Sutherland, *Statutory Construction* (3d ed.) § 2043, and cases cited.

form, extending the principle which it had previously applied in cases of repeals to cases where a temporary statute expired. Act of March 22, 1944, c. 123, 58 Stat. 118. This amendment was aimed at preserving liabilities under wartime statutes which were to expire whenever the war might end. See Sen. Rep. 734, 78th Cong., 2d Sess.

We submit, first, that the Alien Enemy Act is a temporary statute within the meaning of this general saving clause. The Alien Enemy Act does not expire with the end of the war; it is a continuing statute and the policy it expresses is continuous but its operative provisions take effect only in time of war. Neither its substantive provisions nor its meagre administrative apparatus impose any duties on anyone except "whenever there is a declared war."[19] Each time these provisions come into operation, the operation is temporary. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 331-333. The saving clause's inherent purpose of preventing discrimination among different persons affected by a particular statute seems as applicable to the Alien Enemy Act as to any statute which lives during one war and then expires. If the Act had created crimes and imposed criminal penalties, violations of the criminal

[19] For a compilation of statutes permanently in effect but operative only during time of war, see Report to the President by the Attorney General Concerning the Limitation, Suspension, or Termination of Emergency, National Defense and War Legislation 67-74 (1945).

provisions could undoubtedly be punished after the return of peace; non-criminal penalties, forfeitures, or liabilities should likewise be preserved.

If the Alien Enemy Act is, then, a temporary statute within the meaning of the general saving clause, we suggest that petitioner can be said to be subject to a "liability" to removal and a "forfeiture" of his right to remain, which the clause saves. The term "liability" in the saving clause has always been given a broad interpretation. It includes not only criminal liabilities and liabilities for money damages, but also liabilites to take specific action. It covers all specific legal obligations and duties. Cf. *Hertz* v. *Woodman*, 218 U.S. 205 (liability for a tax); *Eastern Coal Corp.* v. *NLRB*, 176 F. 2d 131, 136 (C.A. 4) (liability to reinstate discharged employees); and see generally *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 119; *Herman* v. *Woods*, 175 F. 2d 781, 786 (E.C.A.); *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5); *NLRB* v. *National Garment Co.*, 166 F. 2d 233, 237 (C.A. 8), and cases cited. Once the removal order was issued against petitioner, he was under a specific legal command to depart and was subject to a definitive liability to removal if he neglected or refused to leave. That is the type of "liability" that the general saving clause seems designed to cover. Moreover, the removal order can also be considered a definite "forfeiture" of peti-

tioner's right to remain in this country which survives the lapse of the Act.

If a general deportation statute should be repealed, leaving outstanding valid deportation orders which had not yet been executed, it would seem that the general saving clause would preserve the orders in effect, unless Congress clearly indicated otherwise.[20] The alien would be subject to a specific "liability", and a "forfeiture" would have been declared. Alien enemy removal orders stand on the same footing.

2. Apart from the express terms of the general saving clause there is a broader principle of which the saving statute is a particular manifestation.[21] For instance, in *United States* v. *Curtiss-Wright*

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[20] This is to be distinguished from a mere change in the deportation laws pending judicial review or appeal. See fn. 26, *infra*, p. 36.

[21] "We quite agree that vague arguments as to the spirit of a constitution or statute have little worth. We recognize that courts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that there may be statutes that need a different treatment. A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." Holmes, J. in *Johnson* v. *United States*, 163 Fed. 30, 31-32 (C.A. 1). Cf. *Keifer & Keifer* v. *R. F. C.*, 306 U.S. 381, 389-392.

Export Corp., 299 U.S. 304, 331-3, this Court held that, under a statute which gave the President power to prevent exports to the belligerents in the Chaco war if such an embargo might contribute to peace, the President's subsequent proclamation revoking his earlier proclamation of an embargo did not remit liabilities incurred while the proclamation was in effect. Cf. *United States* v. *Hark*, 320 U.S. 531; *United States* v. *Powers*, 307 U.S. 214; *Rodgers* v. *United States*, 158 F. 2d 835 (C.A. 6), reversed on other grounds, 332 U.S. 371; *Stillman* v. *United States*, 177 F. 2d 607, 619 (C.A. 9); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116.

These cases are analogous to the present case. Their rationale is that the liability is founded on the statute, and the executive action under the statute enforces and gives form to the liability. Hence, so long as the statute continues to exist, the liability subsists. Even though the executive action to implement the statute "cease[s] to be a rule for the future" it does "not cease to be the law for the antecedent period of time." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 332. In the instant case, the liability to removal is grounded in the Alien Enemy Act and the Act continues to subsist. Thus, the executive action under it—the President's removal proclamation and the Attorney General's order—although they have "ceased to be the law for the future," are

still the law "for the antecedent period of time."[22]

These cases have been regarded as an exception to the former common law rule. But they are in harmony with the policy of the general saving clause.[23] We think, therefore, that these cases, taken together with the general saving clause, give expression to a general principle which can properly be applied to the present case. This principle rests on the sound consideration that a contrary rule would result in discrimination, a consideration plainly applicable to the present case. Unless this Court affirms the judgment below, petitioner will have been able, merely by reason of the extreme length of the present proceedings, to escape removal, while other less fortunate aliens, whose proceedings began at the same time, have long since been removed. See *infra*, pp. 34-35.

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[22] From another point of view, the termination of the war is simply the occurrence of the contingency on which the removal provisions of the Alien Enemy Act cease to have prospective operation. The occurrence of this circumstance would not affect the validity of the previously-issued order. Cf. *Ex parte Kaprielian*, 188 Fed. 694 (D. Mass.) (alien woman held deportable, despite marriage to American citizen after issuance of the deportation order, although the statute gave women who married citizens eligibility to citizenship).

[23] This policy is also reflected in the rule that the sentence provisions of the new Criminal Code do not supersede the provisions of the repealed statutes in prosecutions brought before the enactment of the new code. *Hiatt* v. *Hilliard*, 180 F. 2d 453 (C.A. 5); *United States* v. *Kirby*, 176 F. 2d 101, 104 (C.A. 2); *Lovely* v. *United States*, 175 F. 2d 312, 316-318 (C.A. 4), certiorari denied, 338 U.S. 834. The one exception to the principle is that liabilities under a statute rendered invalid by repeal of the constitutional provision on which it rests are not saved from extinction. *United States* v. *Chambers*, 291 U.S. 217.

B. Even if all unexecuted removal orders which were valid when issued do not survive the termination of the war with Germany, there is good reason for holding that this particular order does survive, because the order's execution was delayed for several years because of the habeas corpus proceedings brought by petitioner.

As indicated in the Statement, *supra*, pp. 4-5, petitioner was formally ordered removed in May 1946, and action to effect this order was taken in April 1947. Habeas corpus proceedings were filed in May 1947, and the writ was issued on May 15, 1947 (R. 1). The four and one-half years since that time have been taken up with petitioner's attempt, through habeas corpus, to prevent his removal. The matter was before the District Court until discharge of the writ in October 1950. Thereafter, during the appellate phases of the case, no attempt was made to remove petitioner because of the possible applicability of Rule 45 of the rules of this Court—"Custody of Prisoners Pending a Review of Proceedings in Habeas Corpus."[24]

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[24] "1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

"2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

"3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judg-

See Respondents' Memorandum in Opposition to Petitioners' Application for a Stay, *Ahrens* v. *Clark*, No. 447, October Term, 1947, and fn. 7, *supra*, p. 12.

The delay in execution of the removal order is thus mainly attributable to petitioner. If petitioner had escaped from custody and remained a fugitive until the present time, it seems clear that the removal order could be executed upon his recapture. Similarly, in the present circumstances, there is particularly good ground for applying the general principles discussed above (*supra*, pp. 28-33), and for averting discrimination in the impact of the 1798 Act. Cf. *United States* v. *Powers*, 307 U. S. 214, 217.[25]

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ment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

"4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard."

[25] We do not think that Congress intended a contrary result when it included in its Joint Resolution ending the war an express proviso for the extension of powers under the Trading with the Enemy Act. See fn. 14, *supra*, p. 25. The explanation for this is that Congress wished to continue the power to issue orders vesting alien property, while it desired to terminate, for the future, the power to issue alien enemy removal orders. But this, of course, does not reach the question whether an existing removal order is enforceable. See H. Rep. No. 706, 82d Cong., 1st Sess., 11, 12.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.[26]

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JANUARY, 1952.

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[26] In the event that the Court should feel that the power to execute the removal order has terminated, the Court has power to require petitioner's release in the present proceeding. On review of habeas corpus proceedings, the appellate court does not merely review the propriety of the lower court's action as it was when taken but applies the law as it is at the time of review. *United States ex rel. Wiczynski* v. *Shaughnessy*, 185 F. 2d 347 (C.A. 2). If the Court vacates the judgment below, as is the procedure in moot cases, the petitioner will be left on parole from the respondents' custody. The proper procedure would appear to be to reverse the judgment and remand with orders to the district court to enter a judgment releasing the petitioner. Cf. *United States ex rel. Pizzuto* v. *Shaughnessy*, 184 F. 2d 666 (C.A. 2).

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067, as amended, 50 U. S. C. 21, provides:

§ 21. Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

§ 22. When an alien who becomes liable as an enemy, in the manner prescribed in the preceding section, is not chargeable with actual hostility, or other crime against the public

safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native citizen, denizen, or subject, and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (10 Fed. Reg. 8947):

A PROCLAMATION

Whereas section 4067 of the Revised Statutes of the United States (50 U.S.C. 21) provides:

"'Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or

other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U.S.C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

By the President:

[SEAL.] HARRY S. TRUMAN.

JAMES F. BYRNES,
Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189), pursuant to Presidential Proclamation 2655:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U. S.

Sec.

30.71 Removal from the United States of alien enemies.
30.72 Order of the Attorney General.
30.73 Service of removal order on alien enemy.
30.74 Thirty-day period for voluntary departure.
30.75 Involuntary removal from the United States.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U.S.C. 21.

§ 30.71. *Removal from the United States of alien enemies.*—The Proclamation of the President of the United States, No. 2655 (10 F.R. 8947), dated July 14, 1945, provided in part:

"All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the

principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe."

§ 30.72. *Order of the Attorney General.*—When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principles of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen, or subject.

§ 30.73 *Service of removal order on alien enemy.*—A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74 *Thirty-day period for voluntary departure.*—An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole

safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.*—In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM CLARK, *Attorney General.*

(F.R. Doc. 45-18005; Filed Sept. 27, 1945: 10:11 A.M.)

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